Action Mining, Inc./Sanner Energies, Inc. ***and*** **United Mine Workers of America.** Cases 6–CA–21161, 6–CA–21227, 6–CA–21281, 6–CA–21299, 6–CA–21326, and 6–RC–10066

August 25, 1995

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On September 18, 1990, Administrative Law Judge Russell M. King, Jr., issued the first of the attached decisions. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions. By unpublished order dated July 11, 1991, the Board remanded the proceeding to the judge for further consideration of certain of the unfair labor practice allegations in the consolidated complaint, holding in abeyance consideration of the remaining allegations in dispute. On May 19, 1993, the judge issued the attached supplemental decision. The General Counsel and the Union filed exceptions to the supplemental decision and supporting briefs, and the Respondent filed cross-exceptions to the supplemental decision and a brief both supporting its cross-exceptions and answering the General Counsel's exceptions. The General Counsel also filed a motion, with supporting memorandum, for a hearing de novo before a new judge should the Board not agree substantially with the General Counsel's exceptions, especially those addressing the judge's credibility resolutions in his supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order. The Board has further decided that a Certification of Results of Election should be issued.

I. BACKGROUND AND THE JUDGE'S INITIAL DECISION

This is a consolidated unfair labor practice/representation proceeding. The Respondent consists of two corporate entities: Action Mining, Inc. and Sanner Energies, Inc. It is undisputed that these two entities constitute a single employer for purposes of the law applicable in this case. The Respondent is engaged in the strip mining and sale of coal, primarily in and around Somerset County, Pennsylvania. During the relevant time period in 1988,[3] the Respondent employed 61 employees in the production and maintenance unit the Union sought to represent. In May, certain of the Respondent's employees contacted the Union, thus initiating an organizing campaign. On July 22, the Union filed a representation petition with the Board's Regional Office, and the Respondent was notified of the filing shortly thereafter. The Respondent's immediate reaction was to engage in a series of incidents with individual employees which were subsequently alleged to be unfair labor practices. This initial series of incidents, more fully described below, occurred between July 25 and August 1. On August 22, the Respondent posted a written notice to its employees which sought to identify and disavow this allegedly unlawful conduct.

On August 25, the Respondent sent the first of five letters to its employees, setting forth in detail the bases of its opposition to the employees' representation by the Union. In addition, between September 9 and 15, the Respondent held eight meetings in which it addressed small groups of employees about its concerns regarding union representation. On September 19, the Respondent addressed all of the employees in a speech which summarized the information and campaign views it had conveyed during the previous 4 weeks. On September 20, the Board conducted the representation election; the Union lost 27–34. Pursuant to unfair labor practice charges and objections to the election filed by the Union, certain preelection conduct of the Respondent, involving both its formal campaign statements and incidents with individual employees, was alleged to have violated the Act and interfered with the election. Between late September and early November, several additional incidents occurred in which the Respondent allegedly engaged in unlawful discrimination—essentially acts of alleged retaliation against certain employees because of their union support or activity during the organizing campaign.

In his first decision, the judge concluded that Terry Pletcher and Dave Wyant, who were supervisors and

[1] The Respondent, the General Counsel, and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] At par. 6 of the ''Amended Conclusions of Law'' section of the supplemental decision, the judge stated that on or about September 7, 1988, the Respondent unlawfully threatened a group of employees with the withholding of pay raises because of the union organizing campaign. We do not affirm this conclusion because the judge did not actually find such a violation in the text of either decision and it does not have a sufficient basis in the credited evidence.

[3] All dates hereafter are in 1988 unless otherwise noted.

two of several co-owners of the Respondent, violated Section 8(a)(1) as a result of the incidents between July 25 and August 1. Thus the judge found that, prior to the Respondent's attempted disavowal, they made unlawful threats of plant closure to individual employees on July 25 (twice), July 26, July 27 (twice), and August 1. In addition, he found that, during the same period, Wyant unlawfully interrogated an employee and Pletcher unlawfully created the impression of surveillance on three occasions. These 8(a)(1) violations found by the judge involved about seven of the Respondent's employees.

In addition, although the judge found that the Respondent's August 22 notice to the employees initially fulfilled the requirements for an effective disavowal of the unfair labor practices above, he concluded that the Respondent thereafter violated the Act in several incidents and that this subsequent unlawful conduct invalidated the disavowal notice. Specifically, he found that the Respondent's August 25 letter and a segment of its September 19 speech violated Section 8(a)(1). He also found that the Respondent violated Section 8(a)(1) in an incident on or about September 12 involving employee Neil Berkley and in two incidents involving a total of four employees on September 20, the day of the election.[4]

Further, the judge, in his initial decision, concluded that the various postelection allegations of unlawful discrimination were all meritorious. He found that the short-term layoffs of employees Marker, Yutzy, and Lee on several dates in September, October, and November violated Section 8(a)(3). In addition, he found that the Respondent violated Section 8(a)(3) by a change in working conditions affecting Marker, and by a reduction in Lee's wages and working hours. He also found that a reduction in Berkley's working hours and his subsequent discharge violated Section 8(a)(3). Finally, because of the quantity and nature of all the unfair labor practices committed before and after the election, the judge recommended a bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), in lieu of directing a second Board election.

II. THE BOARD'S REMAND AND THE JUDGE'S SUPPLEMENTAL DECISION

The Respondent excepted to all of the judge's significant findings. On review of the record, and especially in light of the Respondent's exceptions to the judge's factfindings concerning the postelection 8(a)(3) violations, the Board remanded this proceeding to the judge for further consideration of evidence relevant to these alleged instances of unlawful discrimination. In its order remanding, the Board noted that it would defer ruling on the remaining issues in the case because of their potential relationship with the issues on remand.

In his supplemental decision, the judge reconsidered his previous factual findings, including his credibility resolutions, with respect to the 8(a)(3) allegations. As a result of the judge's ensuing modifications to his credibility resolutions, he vacated his earlier 8(a)(3) findings, concluding that all of the postelection allegations should be dismissed. In addition, in light of his revised credibility findings, he overruled his previous conclusion that the Respondent violated Section 8(a)(1) in the incident involving employee Berkley on or about September 12, and recommended dismissal of that allegation as well. In light of these dismissals, the judge withdrew his recommendation for a *Gissel* bargaining order and proposed instead that a second election be conducted because of the impact of the other preelection 8(a)(1) violations on the September 20 election.[5]

III. DISCUSSION

We affirm the judge's dismissals of certain unfair labor practice allegations in his supplemental decision, and we affirm his related findings in that decision to the extent they are consistent with our decision here. In particular, we are satisfied that his supplemental credibility resolutions and factfindings are consistent with a thorough, impartial review of the record regarding the issues which were the subject of the Board's order remanding.[6] Left before us for consideration are the preelection 8(a)(1) violations found by the judge in his first decision and affirmed in his supplemental decision. For the reasons stated below, we find that the allegedly unlawful conduct occurring prior to August 22 was adequately repudiated by the Respondent, and that the General Counsel did not establish that the postrepudiation incidents left in issue amounted to violations of the Act. Accordingly, we will dismiss the complaint and certify the results of the election.

A. *The Respondent's Notice Disavowing Alleged 8(a)(1) Violations Occurring Before August 22*

The alleged preelection violations fall into two basic categories—those which the Respondent sought to disavow in its notice of August 22 and those which alleg-

[4] The preelection unfair labor practices found were sufficient to establish most of the Union's objections to the election. Other objections were overruled by the judge, and the Union did not file exceptions.

[5] In the ''Amended Remedy'' section of his supplemental decision, the judge erroneously suggested that only unfair labor practices involving unlawful discrimination under Sec. 8(a)(3) are to be considered ''hallmark'' violations for purposes of a *Gissel* order. In fact, ''hallmark'' unfair labor practices may include, inter alia, threats of plant closure or job loss in violation of Sec. 8(a)(1). See, e.g., *NLRB v. Jamaica Towing, Inc*., 632 F.2d 208, 212 (2d Cir. 1980). This error does not affect our ultimate disposition of this case.

[6] Accordingly, the General Counsel's motion for a hearing de novo before a new administrative law judge is denied.

edly occurred after that notice. As explained below, the question whether we may properly find violations on the basis of the prenotice conduct turns both on characteristics of the notice and on the existence of postnotice violations. We first address the notice itself, which the Respondent posted on August 22 in an effort to disavow various unfair labor practices allegedly committed between July 25 and August 1.[7]

The Board's standard for an appropriate repudiation of unfair labor practices is set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, and adequately published to the employees involved. Additionally, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and—most significant in the instant case—there must in fact be no unlawful conduct by the employer after publication of the repudiation. Id. at 138–139. A *Passavant* disavowal adequate to remedy unfair labor practices within the critical period before a Board election is also sufficient to restore the laboratory conditions necessary for a valid election. See *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992); *Agri-International Inc.*, 271 NLRB 925, 926–927 (1984).

We agree that the Respondent, through the conduct of Pletcher and Wyant, committed the series of unfair labor practices between July 25 and August 1 found by the judge. However, we also agree with the judge that, consistent with the *Passavant* requirements above, the August 22 notice was sufficient, *on its face*, to repudiate these unfair labor practices.[8] Under Board law and policy, then, the Respondent's predisavowal unfair labor practices are considered adequately repudiated, adequately remedied, and lacking in significant impact, subject to the *Passavant* proviso that no unfair labor practices were committed subsequent to the disavowal notice. Accordingly, as the judge and the parties perceived this case, and as we do, the primary, critical issue here is whether the Respondent committed any unfair labor practices after posting its disavowal. The judge found that four such violations occurred, any one of which would serve to rekindle the unlawful impact of the predisavowal violations. For the reasons set forth below, we conclude that no postdisavowal unfair labor practices were committed.

B. *The Allegedly Unlawful Postdisavowal Statements*

In each of the four postdisavowal incidents on which the judge predicated findings that an agent of the Respondent made statements in violation of Section 8(a)(1),[9] the Respondent was expressing its opposition to the employees' choice of the Union to represent them. Such situations, as we stated in *Mediplex of Danbury*, 314 NLRB 470 (1994):

> raise legal questions involving the interplay of two essential principles of the Act: an employer's free-speech right, set forth in Section 8(c), and the Section 7 right of employees to self-organize, protected by Section 8(a)(1). The Supreme Court established the general standard for evaluating the lawfulness of employer statements addressing employees' Section 7 activity in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In essence, *Gissel* indicates that the analytical question is whether the employer's statement constitutes an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control. See 395 U.S. at 617–619 . . . a significant component in the analysis of an employer's remarks to employees which involve protected activity is ''the context of its labor relations setting,'' *Gissel*, supra, 395 U.S. at 617. In other words, the Board considers the totality of the relevant circumstances, id. at 589; *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477–479 (1941) . . . .

314 NLRB at 470–471. See also, e.g., *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 fn. 4 (1989); *Chrysler Airtemp South Carolina*, 224 NLRB 427, 428, 431–432 (1976); *Hedstrom Co.*, 223 NLRB 1409 fn. 5, 1415–1416 (1976), affirmed in relevant part 558 F.2d 1137 (3d Cir. 1977); *M. O'Neil Co.*, 211 NLRB 150, 150–151 (1974), affirmed mem. 514 F.2d 894 (D.C. Cir. 1975).

The significance of the relevant context, of course, is its role in supplying meaning to what may otherwise be an ambiguous or misleading expression if considered in isolation. It is apparent from our review of the record that the judge's key error in addressing the four incidents at issue was his failure to acknowledge and account for the factual context in which they occurred.

1. The relevant factual context

Early in his first decision, the judge pointed out that at the time of the 1988 organizing campaign, the strip mining industry in the Respondent's geographic area had been negatively affected by a number of economic factors, and that many local coal mining operators had gone out of business. In fact, as the judge noted, the economic downturn had resulted in the Respondent's

[7] The August 22 disavowal notice is set forth in full in sec. III,A,4 of the judge's first decision.

[8] We note that no exceptions were filed to the judge's finding in this regard.

[9] As noted above, a fifth allegation—that an agent of the Respondent had interrogated Neil Berkley on September 12—was dismissed by the judge on credibility grounds in his supplemental decision.

cutting its employees' wages by $.50 per hour in 1986, and the 1988 campaign was driven in significant part by the employees' dissatisfaction with this continued wage reduction. We note in addition the undisputed testimony of Robert Moore, a Mine Workers organizer involved in the 1988 campaign, that at the time of the campaign it was common knowledge among the Respondent's employees that a number of mining operations statewide had closed down due to economic conditions, and that the production of coal and the number of working employees in the strip mining industry in Somerset County had severely decreased. There is simply no dispute in this case that the coal mining industry in and around Somerset County was in a substantially depressed economic condition, that many mining businesses had closed and many mining employees had lost their jobs, and that the Respondent's employees were generally aware of these facts.

After posting its disavowal notice on August 22, the Respondent engaged in what clearly appears to have been a planned, multi-staged campaign of its own to oppose the Union. The August 25 letter to employees, alleged as an unfair labor practice and discussed in detail below, was the first of five letters sent to the employees which set forth the Respondent's campaign positions. All five letters were signed by Larry Sanner, a co-owner of the Respondent and president of its Action Mining operation. On September 2, the employees received a letter discussing, inter alia, the nature and amount of dues which the Union would require under a union-security clause, and pointing out that the Union could not guarantee higher wages and benefits in return for the employees' dues payments. The Respondent's September 13 letter discussed the ramifications of an economic strike, including the loss of wages and benefits and the possible loss of employment positions to permanent replacements. The letter of September 15 focused on economic factors, pointing out, inter alia, that between 1978 and 1987 the number of coal operators in Pennsylvania had dropped from 1100 to 600, and that, during the same period, the number of workers employed in the coal industry statewide had dropped from 43,000 to 19,000. The letter further stated that in Somerset County during the same time period the number of workers employed in the coal industry had dropped from 3200 to 956. This letter also noted the stiff competition among coal operators, including the Respondent, to retain customers, requiring sales of coal at the lowest possible customer bids. Finally, the letter set out a list of 29 coal companies which had shut down operations, the vast majority of them located in Somerset County. The Respondent's final letter, dated September 16, summarized the various points in opposition to unionization the Respondent had made in its previous letters and in its series of employee meetings, discussed below, which had concluded by this time.

Between September 9 and 15, the Respondent held eight small, group meetings for the employees to discuss the Respondent's positions opposing the Union. Each of the employees attended at least one of the meetings. The meetings lasted between 1-1/2 and 2 hours; each of them was conducted in three parts. Douglas Sanner, a co-owner and the president of the Respondent's Sanner Energies operation, addressed the employees on the nature of the bargaining process should the Union become the employees' representative. He explained, inter alia, the Respondent's obligation to bargain in good faith and the fact that there was no guarantee that employees would gain wages and benefits through collective bargaining. Judith Pletcher, a co-owner and the treasurer of the Respondent's Action Mining operation, provided information, with documentation, concerning the Respondent's current financial condition. She informed the employees, inter alia, that the Respondent had lost almost $2 million between 1985 and mid-1988 and had an outstanding loan liability of almost $1 million. She also set out a detailed comparison between the Respondent's profit-sharing plan and the Union's pension plan. Action Mining President Larry Sanner addressed current economic conditions in the coal mining industry in the local area, referring, inter alia, to specific companies which had recently either closed down or laid off large numbers of employees. He also discussed recent strikes by the Mine Workers against specific local companies and the economic impact of those strikes.[10] In addition, he set forth the potential economic consequences if there should be a strike against the Respondent: the right to hire permanent replacements, and the possibility of loss of customers, of layoffs, and of closure of the operations.

The Respondent's formal campaign against the Union ended with a speech by Larry Sanner to all of the employees summarizing its positions on September 19, the day before the election. This speech, one paragraph of which was alleged to be an unfair labor practice, is discussed in relevant detail below. It is noteworthy that, with the exception of the initial August 25 letter and the one paragraph of the final September 19 speech, none of the Respondent's formal communications with the employees described here was alleged to violate the Act. On this record, in light of the surrounding context, they constituted lawful discussions of campaign issues.

[10] One of the documents distributed to employees during these meetings was an excerpt from a Mine Workers publication dated May 1988, stating that the Union currently was engaged in strikes against more than 30 companies nationally, with almost 2000 members on strike.

2. The August 25 letter

On or about August 25, Larry Sanner sent the following letter to the Respondent's employees:

> TO: ALL ACTION MINING & SANNER ENERGIES EMPLOYEES
>
> As I informed you earlier this month, the National Labor Relations Board (NLRB) election will be held on Tuesday, September 20, from 2:00 p.m. to 3:30 p.m. At that time all production and maintenance employees and truckdrivers will be able to vote on whether or not you want the Mine Workers Union in our operations.
>
> The election will be by secret ballot and will be supervised by the NLRB.
>
> I feel very strongly that the future of our Companies and of everyone who works here will be at stake in the election. We are *against* this union because we are convinced that *it could seriously affect our being able to stay in business*. We are one of the last surviving strip mining operations in the whole area, and we have been fighting to try and survive while the industry is going through one of its worst periods ever.
>
> I firmly believe that this Union's long record of creating problems and causing strikes could hurt us even more at a time like this.
>
> In a few days we must send the NLRB a list with the names and home addresses of everyone who is eligible to vote in the election. I wanted you to know this because the list will be given to the Union and their organizers can use it to come to your homes when you're not working.
>
> Between now and the time of the election I intend to sit down with you and go over the issues that are important to all of us. These issues ought to be discussed carefully so that you will have *all* the facts to make a decision. And if anytime you have a question or something you want to talk about, let me know and we can get together. [Emphasis in original.]

In finding that this letter violated Section 8(a)(1), the judge focused almost exclusively on the one sentence: ''We are *against* this union because we are convinced that *it could seriously affect our being able to stay in business*.'' He found that the letter provided no economic or other objective factual support for this statement, and that it was not otherwise phrased in a manner consistent with *Gissel*'s view of a lawful expression. The judge noted that supportive economic information was available to the Respondent at the time of the letter and that it in fact later communicated this information to the employees in the September group meetings. He found that the Respondent's failure to include this information in the letter suggested that it was trying to benefit from the impact of a clearly unlawful plant closure threat by ''covering its tracks,'' in effect, with subsequent lawful communications.

We acknowledge that Larry Sanner's status as a coowner and a chief executive of the Respondent enhanced the significance of what was being conveyed in the letter. Even accounting for this, however, it is apparent that the judge's view of the letter is erroneous. He failed to analyze the letter in its full context—with regard to the entirety of the letter itself and more broadly with regard to the letter's place in the factual context of this case. Thus, in the third paragraph of the letter, immediately after the sentence which the judge found unlawful, is the following: ''We are one of the last surviving strip mining operations in the whole area, and we have been fighting to try and survive while the industry is going through one of its worst periods ever.'' This third paragraph as a whole refers to matters which were commonly known to the employees—that the strip mining industry in Somerset County was in a serious economic decline, that operations like the Respondent's had been closing down, and that unemployment among coal mining employees due to the economic conditions had risen precipitously. In this light, the letter's ''stay in business'' language is an ambiguous statement at worst, rather than the overt retaliatory threat the judge found. Further, in the last paragraph, the letter points out the Respondent's intention to engage in more discussion of the campaign issues with the employees and to supply them with ''*all* the facts to make a decision,'' thus making clear that the message being conveyed in the letter was not complete. And, in fact, as set forth above, the Respondent followed up the August 25 letter, in other letters and in meetings, with a considerable amount of relevant information substantiating the Respondent's assertions concerning economic conditions not within its control which were affecting its ability to continue operations.[11]

In these circumstances, viewing the letter as it was reasonably viewed by the employees—a broad prefatory overview which, as the letter indicated, would later be fleshed out—we conclude that it did not con-

[11] Subsequent campaign communications can provide a lawful context for a facially ambiguous remark. E.g., *Southern Frozen Foods, Inc.*, 202 NLRB 753, 754–755 (1973), affd. sub nom. *Laborers v. NLRB*, 501 F.2d 868, 876–878 (D.C. Cir. 1974) (speech by Kato Harvey). We find that this is particularly true when, as here, the remark in dispute is accompanied by a specific promise of further explanation. In fact, the judge conceded that the Respondent's subsequent communications with employees provided objective evidence substantiating the possible adverse business effects mentioned in its August 25 letter, but he inferred a sinister, manipulative motive from the failure to include all of this evidence in the letter itself. We disagree. The 8(a)(1) issue presented is one of objective effects, not motivation. In any event, we find no warrant for accusing the Respondent of impermissible brinkmanship in a letter that did make a summary reference to objective, well-known economic facts supporting its opinion and specifically promised further explanation.

stitute a threat of retaliatory plant closure should the employees choose the Union. Rather, it was part of an objective, fact-based expression of potential consequences of unionization beyond the Respondent's control. See, e.g., *Chrysler Airtemp*, supra at 428, 431–432; compare, e.g., *American Spring Wire Corp*., 237 NLRB 1551 (1978) (unlawful plant closure threat found in the absence of supporting objective facts). Therefore, the allegation that the August 25 letter violated Section 8(a)(1) is dismissed.

3. The September 19 speech

On September 19, the day before the election, Larry Sanner addressed all of the Respondent's employees from a prepared text. The speech lasted about 10 minutes. It was, in effect, a detailed summary of the campaign positions the Respondent had conveyed to the employees in its letters and group meetings over the previous 4 weeks. Thus, inter alia, Sanner reviewed the nature of the collective-bargaining process, the negative economic conditions in the region affecting the strip coal mining industry generally and the Respondent in particular, the comparative benefits of the Respondent's profit-sharing plan and the Union's pension plan, and the possible consequences of a strike, including the potential loss of customers.

In further reference to the possible loss of business, Sanner read the following paragraph:

> But if the Union got in here, we might even lose customers *without* having a strike. We don't know how any of our customers would react if they learned that we had to bargain with UMW and if they were concerned that the bargaining might end up in a strike. For example, we supply about 15 to 20,000 tons of coal to cement companies in Eastern Pennsylvania. If they were worried about the fact that regular deliveries could be interrupted by a strike, they might choose to put their eggs in several baskets instead of just ours. If they did, that could hurt us. Everyone here knows that it's difficult to find a market for the low volatile coal we produce and we're at a terrible disadvantage to those operators who can ship on Conrail at a freight cost 3 to 4 dollars a ton below ours. [Emphasis in original.]

The judge found that this paragraph, apart from the rest of the speech, constituted a threat of loss of customers due to unionization in violation of Section 8(a)(1), because it lacked any supporting facts.

We again acknowledge the effect of Larry Sanner's status in enhancing the impact of what was communicated. However, we also note that the statement at issue is one paragraph in a fairly lengthy speech otherwise free of any alleged taint, and that the statement followed logically from Sanner's preceding, legitimate remarks about the potential loss of customers as a possible result of a strike. It is also noteworthy that the tone of the paragraph is exceedingly speculative, i.e., one hypothetical followed by another, and another, in related fashion, thus diluting its significance. Further, all of these related suppositions involve conceivable concerns of the Respondent's customers regarding interruptions in deliveries in the event of a strike, i.e., matters beyond the Respondent's control. Finally, there is at least some factual basis supporting the statements in the paragraph in the reference to the competition among coal operators for customers—a subject Sanner had touched on earlier in the speech and had discussed with the employees in his September 15 letter.

Taking all of the above into account, it is unreasonable to perceive in this one paragraph of the speech any ''implication that [the Respondent] may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him . . . .'' *Gissel*, 395 U.S. at 618.[12] In other words, we find no unlawful threat of retaliation, implicit or otherwise, in this statement, and accordingly, we dismiss the allegation that it violated Section 8(a)(1). Compare, e.g., *Harrison Steel Castings*, 293 NLRB at 1158–1159 (statement concerning loss of business found to be an unlawful threat pursuant to an assessment of all relevant circumstances, including the employer's other unlawful conduct).

4. The September 20 discussion with employees Vena and Robertson

On the morning of the election, September 20, Larry Sanner had a conversation with employees Vena and Robertson in an area of the Respondent's facility called the scale house.[13] They discussed the relative merits of the Respondent's profit-sharing plan and the Union's pension plan, with Sanner providing concrete figures representing the amounts each of the employees had accumulated in the profit-sharing plan. Vena said he thought the Union's plan would be better because it included insurance. According to Robertson's credited testimony, Sanner then said, referring to the Union's plan, ''that if the Union come in, there would be no guarantee that we'd get two years under the union[14] . . . and that, you know, at men our age,

[12] The failure of the Respondent to offer proof that customers had actually stated they would withdraw business out of concern for the possibility of strikes does not make unlawful an objectively reasonable statement of opinion that this could happen. E.g., *CPP Pinkerton*, 309 NLRB 723 (1992), and *Buck Brown Contracting Co*., 283 NLRB 488 (1987).

[13] Contrary to the judge's finding, there is no evidence that Sanner ordered the two employees to report to the scale house.

[14] It is undisputed that the ''two years'' reference was to a requirement of 2 years of employment under the coverage of a relevant bargaining agreement in order to establish eligibility for the Union's pension plan.

where would we get a job in construction.'' The conversation lasted about 15 minutes. The judge found that Sanner's statement that there was no guarantee that the two would work long enough to qualify for the Union's pension plan was a threat of loss of employment in violation of Section 8(a)(1).

Sanner's comments, considered in isolation, might well be the basis for an unfair labor practice. However, during the weeks leading up to September 20, the Respondent had conveyed to all the employees, in letters and in meetings, extensive, objective information relating to its tenuous economic position due to conditions in the industry, as well as detailed, comparative information concerning the profit-sharing plan and the Union's pension plan. Sanner had summarized this information, as well as other matters relating to the Respondent's campaign positions, in a speech to the employees only the day before. Given this factual background, Vena and Robertson would reasonably have understood Sanner's statement that there was no guarantee of ''two years under the union'' as referring to an arguable weakness in the Union's pension plan, in light of the precarious economic circumstances facing the Respondent's operation. Again, even accounting for Sanner's management/ownership status, the record does not provide an adequate basis for an inference that Sanner was suggesting that he would, ''solely on his own initiative,'' engage in retaliation—whether job loss or plant closure—should the employees vote in the Union. In these circumstances, Sanner's further remark concerning the employees' age and the difficulty of finding new jobs was not sufficient to turn the discussion into a threat of retaliation because of union organizing. Here, it was no more than a blunt statement representing part of the legitimate give and take of a conversation about campaign issues, and permissible under Section 8(c). See, e.g., *Optica Lee Borinquen, Inc*., 307 NLRB 705, 708 (1992). Accordingly, this 8(a)(1) allegation is dismissed.

5. The September 20 discussion with employees Berkley and Savage

According to the credited testimony, Larry Sanner had a similar conversation about the Respondent's profit-sharing plan with employees Berkley and Savage on the morning of September 20. Berkley, referring to the fact he had been laid off previously for economic reasons, said, ''what's to say that I'm going to be here in two weeks or two months . . . that [profit-sharing plan] won't do me no good then.'' Sanner responded, ''what makes you think you are going to be here in two weeks or two months if the Union's here.'' The discussion ended soon after this exchange. The judge concluded that Sanner's statement here also constituted a threat of job loss in violation of Section 8(a)(1).

The relevant factual context for this incident is essentially the same as for the other September 20 incident discussed above. In the days and weeks leading up to this discussion, the employees had been provided with extensive, detailed information concerning both the Respondent's unsteady financial status due to economic conditions beyond its control and the relative merits of Respondent's profit-sharing plan and the Union's pension plan. Berkley, referring to a previous economic layoff, remarked on the unpredictability of continued employment with the Respondent in criticizing the usefulness of the Respondent's profit-sharing plan. Sanner responded in kind, noting that the unpredictable nature of employment with the Respondent would not change simply by voting in the Union. This is the reasonable interpretation of the exchange between Berkley and Sanner, and most particularly of Sanner's repetition of the phrase ''two weeks or two months'' in his retort. These circumstances do not yield a reasonable inference that Sanner was implying an unlawful threat of retaliation. Rather, his comment was a product of conversational give and take concerning campaign issues, and lawful under Section 8(c). This complaint allegation is therefore dismissed.

IV. CONCLUSION

In the absence of any unfair labor practices occurring after the Respondent's disavowal notice of August 22, its *Passavant* repudiation of the 8(a)(1) violations committed between July 25 and August 1 remained effective, and the laboratory conditions for the September 20 election remained intact. In the absence of any unfair labor practices to remedy, we will dismiss the complaint, and in light of the 27–34 vote of the employees rejecting union representation, we will certify the results of the election.

ORDER

The consolidated complaint in Cases 6–CA–21161, 6–CA–21227, 6–CA–21281, 6–CA–21299 and 6–CA–21326 is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots in Case 6–RC–10066 have not been cast for the United Mine Workers of America, and that it is not the exclusive representative of the bargaining unit employees.

Patricia J. Scott, Esq. and *JoAnn F. Dempler, Esq*., for the General Counsel.

Robert P. Weintraub, Esq. and *Richard D. Wayne, Esq. (Hinckley, Allen, Snyder & Comen)*, of Boston, Massachusetts, for the Respondent Employer.

Michael Dinnerstein, Esq., of Washington, D.C., for the Charging Union and the Petitioner.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge. This case was tried before me on May 2–5 and 9–12 and July 25–28, 1989, in Somerset, Pennsylvania. Consolidated complaints were issued on November 9 and 14, 1988, and January 11, 1989, by Region 6 of the National Labor Relations Board based upon charges filed by the United Mine Workers of America (the Union) on various dates between August 2 and November 8, 1988.

On September 20, 1988,[1] Region 6 conducted an election among Respondent's employees pursuant to a petition filed July 22, 1988 (Case 6–RC–10066). In that election, of 61 eligible voters, 27 voted in favor of representation and 34 voted against. On September 26 and 27, the Union filed objections to the conduct of the election with Region 6. Those objections have been consolidated with the instant cases for decision.

The issues presented by the complaint include:

(1) Whether there were independent violations of Section 8(a)(1) of the National Labor Relations Act (the Act).

(2) Whether certain employees were laid off for short periods of time in violation of Section 8(a)(3) of the Act.

(3) Whether the terms and conditions of employment of employee Frank Lee were changed by a reduction of his hourly wage and a cut in his hours of work in violation of Section 8(a)(3) of the Act.

(4) Whether Respondent imposed more onerous conditions of work on employee Scott Marker in violation of Section 8(a)(3) of the Act.

(5) Whether Respondent reduced the hours of work of employee Neil Berkley in violation of Section 8(a)(3) of the Act.

(6) Whether, on October 11, 1988, Respondent terminated employee Neil Berkley in violation of Section 8(a)(3) of the Act.[2]

(7) Whether Respondent's conduct warrants setting aside the election conducted in September 1988.

(8) Whether Respondent's conduct warrants the issuance of a remedial bargaining order.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel,[3] counsel for the Union, and counsel for the Respondent, I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

Action Mining, Inc. and Sanner Energies, Inc. at all times material have been affiliated business enterprises with common officers, ownership, directors, management, and supervision. These entities have formulated and administered a common labor relations policy affecting their employees; have shared common facilities and premises; have provided services for one another; and have interchanged personnel and held themselves out to the public as a single integrated business enterprise. At all times material these two entities have been Pennsylvania corporations with offices and places of business in Meyersdale, Pennsylvania, together with various locations in Somerset City, Pennsylvania, and Garrett County, Maryland, where they are engaged in the mining and nonretail sale of coal.

By virtue of the business operations described above, Respondent constitutes a single integrated business enterprise and is a single employer within the meaning of the Act.

During the 12-month period ending July 31, Respondent, in the course and conduct of its common business operations, shipped from its jobsites in Pennsylvania and Maryland, coal valued in excess of $50,000 directly to points and places outside the Commonwealth of Pennsylvania and the State of Maryland.

I find, as Respondent admits, that Action Mining, Inc./-Sanner Energies, Inc. constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will promote the purposes and policies of the Act to assert jurisdiction here.

II. LABOR ORGANIZATION

The General Counsel asserts, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Respondent's business

Respondent is engaged in the strip mining of coal. Certain aspects of this operation are governmentally regulated in the interest of the environment at the minesites. A Respondent official, Larry Sanner, described the process in the following manner: A bulldozer is first used to build a pond; this pond

---

[1] All dates hereafter are in 1988 unless otherwise noted.

[2] The pertinent parts of the Act (29 U.S.C. § 151 et seq.) read as follows:

Sec. 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

. . . .

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

[3] The term ''General Counsel,'' when used here, will normally refer to the attorneys in the case acting on behalf of the General Counsel of the Board, through the Regional Director. Citations to exhibits will be given as G.C. (for General Counsel), R. (for Respondent Employer), and C.P. (for Charging and Petitioning Union), followed by the exhibit number.

[4] The facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings here, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to here, has been reviewed and weighed in light of the *entire* record.

is inspected by the Department of Environmental Resources (DER) which must certify it. The top and subsoil is removed by a scraper (also known as a pan) and stored to one side for later use in restoring the terrain. A bulldozer is then used to level off the terrain. A dragline (a machine used for excavation) removes the material directly overlying the coal seam. If this material is rocky, dynamite is first used to break up the rock so the dragline may function. The dragline then removes the coal which is then loaded on trucks by bulldozers or front-end loaders. The coal is then transported to the tipple[5] area for grading and cleaning. Trucks deliver the coal to the ultimate consumers. The strip mined locale must be replanted to comply with DER requirements.

Prior to the hearing, strip mining in the area containing Respondent's operations had been adversely affected by a number of economic factors. Many coal mining operations had gone out of business. Many of the conflicting contentions in this case turn on whether Respondent based its communications to its employees about the desirability of union representation on the facts about this local turndown. The turndown had been such that in 1986 Respondent's employees had been subject to a 50-cent-per-hour wage cutback. This cut had not been restored as of the time of the hearing and, indeed, the General Counsel concedes that the April union campaign got underway, in large measure, as a result of employee dissatisfaction with this state of affairs.[6]

The General Counsel presented evidence tending to show, as background, that even prior to the start of the April union drive, Respondent's officials demonstrated animus to the possibility of union organization. When employee Neil Berkley was hired in December 1987, Larry Sanner, one of the coowners, declared that if the Company went union, Berkley might well be looking for another job because he (Sanner) would ''shut the doors.''[7]

2. The advent of the Union

As previously noted, a union organizing drive got underway in April. Employees Lee and Marker first contacted Mine Workers International Representative Robert Moore. A meeting was held in May. Employees Marker, Lee, Wiegel, and Yutzy attended. The employees signed Mine Workers authorization cards although, at that time, Moore did not have union permission to solicit signatures.[8]

As interest among Respondent's employees increased, further meetings occurred. In fact, the meeting became a weekly event, mostly sited at the Somerset Holiday Inn or the Meyersdale Rod and Gun Club.

Authorization cards appear to have been signed at the vast majority of the meetings. International Representative Moore testified credibly and accurately about the procedure used in soliciting the signatures. According to Moore, the cards were first distributed, and he then requested the employees to read the cards to themselves, while he read its contents aloud to them. He specifically stated that by signing the card, an employee would be selecting the Mine Workers to be his exclusive bargaining agent for wages, hours, terms and conditions of employment. Moore explained that while the card could be used to obtain voluntary recognition from the Employer (their numbers and authenticity would be checked by a third party), the usual course of events would be to file a petition with the Board. To do so, the Union would need cards from a minimum of 30 percent of Respondent's employees. The petition would eventually lead to an election which would be by secret ballot. Moore emphasized that if the employees did not desire the Union to represent them, they should not sign the cards.

According to Moore, some employees had questions about the later use of the cards. To one such question, Moore replied that while every effort would be made to keep the cards confidential, they might be shown in an unfair labor practice case. Moore also noted to the employees that in the event of employer retaliation for union activities, the dated and signed cards would afford some documentary proof of union affiliation and, thus, a degree of protection for the employee.

Moore, as well as employees who testified, stated that the union representatives said ''there were no guarantees.'' The only promise offered was to the effect that the Union, if selected by the employees, ''would negotiate the best contract we could from them.'' (Tr. 57.)

Some cards were solicited by employees, notably Marker and Lee. These cards were invariably witnessed by another individual or an organizer. On July 21, 37 of 61 unit employers had signed cards under the circumstances above noted.

3. The representation petition

The Mine Workers filed the petition in Case 6–RC–10066 on July 22. Respondent, pursuant to normal procedures, received written notice of this event shortly after the filing date. Pursuant to this petition, an election among Respondent's employees took place on September 20. Of the 61 eligible voters, 27 cast ballots favoring representation and 34 cast ballots rejecting it. The Mine Workers filed objections to the election with the Regional Office on September 26. These objections were thereafter amended and consolidated with the instant case for hearing.[9]

4. Respondent's reaction to the advent of the Union

Respondent's reaction to the Union started the day it received notice of the filing of the petition in Case 6–RC–10066. That day (July 25) Supervisor and Owner Terry Pletcher was at the Emerick jobsite. There, he gave directions for the job assignments for that location. While talking with employees Dwayne and Gary Blank, Pletcher remarked that Respondent had been intending to go to a 9-hour work-

[5] So called because the vehicles carrying the coal are tipped over to empty them.

[6] One incident demonstrating this fact was the painting on a large rock at one of Respondent's locations the words ''Wanted Pay Raise.''

[7] While otherwise unmotivated, I find this statement to have been made because Berkley had recently come out of a union-related situation at Somerset Welding Co. which had attracted local attention because of numerous charges and attendant litigation. Sanner was cautiously letting Berkley know that he desired no such developments at Respondent.

[8] The cards were later disposed of and newly executed cards were obtained when Moore did receive such permission.

[9] See. G.C. 1(n), (o), and (p). The Regional Director directed that a hearing take place to resolve the issues raised by the objections. See G.C. 1(Q). In that same order, he directed consolidation of the R-case objections with the unfair labor practice allegations in the instant case.

day but had decided it could not do so because of a letter it had received. One of the Blanks asked ''what letter'' and Pletcher said they knew what he was referring to. He then commented that ''if the Union was brought in, the company would close the doors and they would be looking for a job.'' Noting that business was bad, Pletcher told the men that if they were promised the world by the Union, the Union would have to keep the promise because Respondent could not give them higher pay. Pletcher concluded by saying he would not mention the matter again and they should do ''the right thing.''

The next day (July 26) Supervisor and Co-owner Dave Wyant spoke about the Union with employee Scott Marker. Marker admittedly started the conversation by asking Wyant what was going on about the Union and why Terry Pletcher had told several employees that he (Marker) was the ''long legged S.O.B.'' who was the ''main instigator'' of the Union. Wyant did not agree that Pletcher had said these things but said he could tell Marker one thing: that if the Union came in, the Company would ''shut the door; it would not work one day under a Union.'' Marker asked where this left him. Wyant replied that it didn't look good for him and said Marker should clear his name with Pletcher and Larry Sanner (another owner). Wyant continued by asking Marker what he felt concerning the Union and what involvement he had with it. Wyant also inquired as to where the Union was holding its meetings. Marker did not answer these questions. He explained that if he supported the Union, Wyant would be angry but, on the other hand, if he said he didn't support the Union, he would be taken for a liar.

The next day (July 27) when Marker again saw Wyant, he told Wyant that Pletcher was continuing to disparage him to fellow employees. Hence, said Marker, he would be 100 percent for the Union.

Wyant and Pletcher, on cross-examination confirmed the latter's remarks set forth above about Marker and his connection with the Union.

On July 26, Pletcher, at pit 21, spoke with employee Ken Groff. Pletcher began by informing Groff that a job located across the hill from pit 21 was to be shut down. Groff asked whether that action was due to a poor quality of coal mined at that location. Pletcher said it wasn't the coal, it was ''the Union stuff,'' On Groff asking ''what Union stuff,'' Pletcher said that Groff knew the Union was trying to get in. Pletcher continued by saying that while he was not making any threats, if the Union got in the Company would shut down.

On July 27, Pletcher went again to the Emerick location. This time he talked with employee Daryl Bishop. In this conversation, Pletcher asserted (1) that the Employer knew who had started the Union and did not blame the Emerick employees and (2) that the Employer could not afford continued operations if the Union was successful, and would have to shut down.

On July 28, Pletcher had a second conversation with employee Dwayne Blank.[10] Pletcher told Blank he knew what other employees' gripes were and wanted to know about his (Blank's). Blank said his grievances were like the others, i.e., he thought the employees should have better wages, benefits, and other ''stuff.'' Pletcher said the Employer could not afford more money at that time. He said he knew who some of the union ''instigators'' were and warned Blank that he should not let a few spoil if (sic) for everyone else. Pletcher then asked why the employees did not take up their concerns with the Company rather than bringing in the Union. Blank replied that whenever they had done so, they were consistently put off with promises of future reconsideration. Furthermore, Blank said, that according to other employees, Dave Wyant had told an employee that with current wage rates, he was living ''too high off the hog.'' Pletcher replied that Wyant's actions in this regard were inappropriate and the he would speak to Wyant about this remark. Noting that Blank had a good head on his shoulders, Pletcher opined that Blank would do the right thing. Pletcher ended by warning Blank that this was the last time he would talk with him as he would not be coming around to give Blank a pep talk every day.

On August 1, Pletcher was accompanied by Joseph Yutzy in Pletcher's truck. They were on their way to the Emerick location. Yutzy asked Pletcher when the Schrock job would start up. Pletcher said he didn't know if the Employer would start the job, and that it depended on ''this s——.'' Yutzy asked what he meant and Pletcher said that Yutzy knew what he was talking about, that if the Union came in, it would bankrupt the Employer.

After the conversations related above, the Union filed an unfair labor practice charge on August 2. (See G.C. 1(a).) The charge was designated Case 6–CA–21161. While Region 6 was investigating this charge, Respondent posted a letter to its employees at the various job locations on August 22. (See R-L.) The purpose of this letter was to disavow any unfair labor practices that might have been committed. The text was as follows:

> TO: ALL EMPLOYEES OF ACTION MINING AND SANNER ENERGIES
>
> Recently the Mine Workers Union filed an unfair labor practice charge against our Companies in which it alleged that Action and Sanner had ''interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.'' We want you to understand that the rights referred to in the charge are those which you have under the National Labor Relations Act to either engage in Union activities or not to engage in such activities, or to choose to be represented by a labor union or not to be represented by a labor union.
>
> The N.L.R.B. is presently investigating the charge against our two Companies, it has interviewed certain employees, may interview others and will be speaking to some of our supervisors. What we have learned as of now is that some of the following statements are alleged to have been made by either Terry Pletcher or Dave Wyant or both of them.
>
> 1. That the Company would close its doors if the Union came in.
>
> 2. That the Company would not open a new site on account of the Union.
>
> 3. The Company gave the impression that it was engaging in surveillance of Union activities by stating that it knew who the Union instigator was.
>
> 4. That if the Union didn't get in, it didn't look good for a certain employee.

[10] Pletcher and Blank were friends.

5. That the Company had intended to go to 9-hour days, but cancelled it due to the Union's petition.

We have also been told that one employee was interrogated about his Union activities.

We want to make it clear to everyone who will be voting that you have the right to vote exactly as you want, without being interfered with, restrained or coerced in any way. If any of the above statements were made by our supervisors, we want to disavow them at this time. Specifically we want it understood that:

Neither of these companies would base a decision of whether to shut down or on whether to open a new mining site on the fact that the Union has filed a petition or may have won the election. As always, our decision on whether to remain in business and whether to expand either company to another location would be based on our economic situation.

No employee will be discharged or disciplined in any way for supporting the Union, whether the Union wins or loses the election. You have the right to support or not to support the Union in this election, as you choose. Our supervisors have been instructed not to engage in any surveillance of Union activities, not to give anyone the impression that they have been doing so and not to interrogate employees concerning any other activities involving the Union. We want each of you to make your decision based on fact not on threats or promises, or any form of coercion, and to be assured that our Companies will not interfere with your Section 7 rights in the future.

It is correct that as of July 25 the Companies intended to got to 9-hour days. That decision had been made over the weekend of July 23–24. At about 10:00 a.m. on July 25 a representative of the N.L.R.B. called our office to as to whether we had received the election petition filed by the Union. We knew nothing of a petition before that call. We notified our local attorney of this telephone call and of our intention to go to 9-hour day. He informed us that changing the hours immediately after learning of a Union petition could be construed as an unfair labor practice by being a benefit to employees, and he advised us against doing it. Based on that, we did not go to the 9 hours. Since that time, we have been further advised by a labor relations specialist that as long as our decision to go to a 9-hour day had been made before we learned of the petition, it is lawful for us to put the change into effect as we had intended. For that reason, all employee will be scheduled for a 9-hour day, Monday through Friday, as of August 22nd.

We expect that the N.L.R.B.'s investigation of this charge will be completed within the next two weeks.

Three days after posting the August 22 disavowal, Respondent mailed a second letter to its employees dated August 25. Its text was as follows:

TO: ALL ACTION MINING & SANNER ENERGIES EMPLOYEES

As I informed you earlier this month, the National Labor Relations Board (NLRB) election will be held on Tuesday, September 20, from 2:00 p.m. to 3:30 p.m. At that time all production and maintenance employees and truckdrivers will be able to vote on whether or not you want the Mine Workers Union in our operations.

The election will be by secret ballot and will be supervised by the NLRB.

I feel very strongly that the future of our Companies and of everyone who works here will be at stake in the election. We are *against* this union because we are convinced that *it could seriously affect our being able to stay in business*. We are one of the last surviving strip mining operations in the whole area, and we have been fighting to try and survive while the industry is going through one of its worst periods ever.

I firmly believe that this Union's long record of creating problems and causing strikes could hurt us even more at a time like this.

In a few day we must send the NLRB a list with the names and home addresses of everyone who is eligible to vote in the election. I wanted you to know this because the list will be given to the Union and their organizers can use it to come to your homes when you're not working.

Between now and the time of the election I intend to sit down with you and go over the issues that are important to all of us. These issues ought to be discussed carefully so that you have *all* the facts to make a decision. And if anytime you have a question or something you want to talk about, let me know and we can get together.

Sanner testified that at the time of writing the August 25 letter, he possessed considerable economic and other information about the state of Respondent's business and that of other coal mining enterprises in the immediate neighborhood. (See Tr. 1174–1177 and Tr. 1296.)

About 10 days or 2 weeks before the September 20 election date, President Douglas Sanner was present at the tipple (jobsite 300) where employee Neil Berkley worked. While Berkley was loading a truck with coal, Sanner asked him how he felt about the election and the ''situation happening at the time.'' He also inquired as to whether Berkley had any questions. Berkley answered that he did not have questions. Sanner again asked how he felt about (it). Berkley told him that ''well, if I feel the Union is going to give me the best—the best opportunity, I am going to vote yes. If I feel that management will give me the best deal, that I would vote no.'' (Tr. 295.) Berkley went on to say that he would be asking questions at the group meeting that might ''p—'' some people off but that he would not be doing it to be an ''a—hole'' but because he needed to know what was going on. Berkley concluded by suggesting that the management accept the Union's invitation to debate in front of the employees. Sanner turned this suggestion down.

At about this time (although not in the same conversation) Berkley approached Larry Sanner to ask for a raise in pay. Sanner said he could not grant a raise because of what was happening with the Union. Berkley argued that Sanner could clear the raise with the Labor Board or the Union (presumably to avoid an unfair labor practice charge) but Sanner replied that he would not seek permission to give a raise from anyone. Berkley then complained that Mike Neil, an employee with less seniority than himself, had been working

when Berkley should have. Sanner initially denied this, but when told there were two witnesses to the fact, said that Neil was not an Action employee.

Either that same day or shortly thereafter, Berkley had a second conversation with Sanner about a raise. Berkley had asked a driver whose truck he was loading to ask Sanner to give him a raise. Sanner again replied that he could do nothing with the Union in the picture.

On September 20 (the day of the election) Larry Sanner ordered employees Robertson and Vena to report to the scale house office. Sanner went over the terms of the employees' profit-sharing plan and pointed out how much money the two employees had in the plan. Vena said he thought the Union's plan was better because it had insurance. Sanner said if the Union got in there was no guarantee they would get 2 years of employment. He pointed out that men their age would have difficulty getting a job in construction. A similar conversation (on the same subject) took place that same day between Larry Sanner and employees Savage and Berkley.

Berkley interrupted the account of the profit-sharing plan to point out that there had been a previous layoff and, in light of that, there was no assurance of continued employment. Without that assurance, he said, the profit-sharing plan was worthless. Sanner asked what made Berkley think he would be employed in 2 weeks or 2 months with the Union present.

The day before the election (September 19) Larry Sanner assembled all Respondent's employees in the warehouse. There, he read a prepared text in which, inter alia, he stated:

> But if the Union got in here, we might even lose customers *without* having a strike. We don't know how any of our customers would react if they learned that we had to bargain with UMW and if they were concerned that the bargaining might end up in a strike. For example, we supply about 15 to 20,000 tons of coal to cement companies in Eastern Pennsylvania. If they were worried about the fact that regular deliveries could be interrupted by a strike, they might choose to put their eggs in several baskets instead of just ours. If they did, that could hurt us. Everyone here knows that it's difficult to find a market for the low volatile coal we produce and we're at a terrible disadvantage to those operators who can ship on Conrail at a freight cost 3 to 4 dollars a ton below ours. [Emphasis in original. See G.C. 43.]

5. The postelection treatment of employees Marker, Yutzy, and Lee

Larry Sanner testified that Respondent's practice was to assign other work to employees when they were unable to perform their usual tasks because of inclement weather.[11] On September 25, 5 days following the election, employees Marker, Yutzy, and Lee were told not to report to work the following day. Supposedly it was too wet for them to perform their regular duties. None of Respondent's other 58 employees were held out of work.

Yutzy testified that in the past, when the weather was poor, he had been assigned other work to do. Prior to the election, wet weather had never prevented his assignment to another job. (See Tr. 683.)

Marker stated that when he could not operate the pan during inclement weather he was always assigned other work. (Tr. 458.) In fact, this had occurred the day of the election. The practice of assigning other work on wet days was, in fact, so common that on a number of occasions Marker reported to help out the mechanics without directly checking with his immediate supervisor. Larry Sanner was aware of the fact that Marker occasionally worked with the mechanics.

Lee stated that on the two prior occasions when he could not perform his regular work, he was assigned to other tasks.[12] Lee, Marker, and Yutzy were with union supporters who manned a support line a small distance away from the polling area the day of the election.

At the conclusion of his layoff (October 2) Lee was instructed to report to jobsite 200 where he was to work on a crusher machine. On this reassignment, Lee suffered a loss in both his rate of pay and number of work hours. His rate dropped from $9 per hour to $7.50. His scheduled hours dropped from 45 to 40. A week later, after discharge of employee Berkley, Lee was assigned to truck loading in Berkley's place. Truck loading was not steady work and the number of hours fluctuated from day to day. Lee thereupon began calling in each day to learn the number of scheduled hours. Later on, Larry Sanner directed Lee to continue this practice so he could review the status of the work.

The fluctuating hours associated with the truck loading embarrassed Lee in another way. Lee operated a small business as well as working for Respondent. He experienced considerable trouble with this business in adapting to the irregular hours of the truck loading job. Respondent was aware that he owned and operated this business venture. The situation became so inconvenient that on one occasion Lee discussed the matter with Larry Sanner. He suggested that Sanner lay him off rather than work him at irregular reduced hours and a lower pay rate because he could do better financially operating his business venture. Sanner refused to do this.[13]

Respondent changed another work practice following the election. Employees had been allowed to build up extra hours so that they could take time off during hunting season without undue financial loss. Prior to the election, this extra time could be built up during the week. After the election, Larry Sanner informed Marker through his supervisor, Galen Beechy, that the extra time could be accumulated only during regular working hours on Saturday. Marker was, therefore, upset when he observed Sylvan and Marain Warnick working late during the regular week. Both these employees had worn ''vote no'' hats while working during the election campaign. Marker had worked the extra hours during the week the previous year to gain time for the hunting season.

[11] While Sanner denied that there was a written policy (or even an unwritten one) his description of Respondent's actual practice at Tr. 1267–1268 makes it clear that Respondent's practice was to find other work for employees affected by the weather.

[12] These two instances seem to have been the sum total of such occasions. (See Tr. 923.) Lee was hired in May 1987 and thus had far less time to accumulate such incidents than Yutzy or Marker who were hired in 1981 and 1984 respectively.

[13] A layoff is not a ''quit'' or discharge. I interpret Lee's request as being one to be laid off as long as the reduced rate and irregular hours affected his employment. Otherwise, he would simply have quit Respondent's employ.

On November 6, Marker and Yutzy were again notified not to report because of wet weather. Both agreed that it was to too wet to perform their assigned operations. However, no alternate work was found for them. Yutzy, in particular, asked about night-shift work and was told by Larry Sanner that the dragline at pit 9 was broken and the pit 9 crew would be reassigned to pit 18. Yutzy went by pit 18 and saw no crew working there.

Joseph Yutzy was also laid off on October 24. He agreed it was probably too wet to operate the pan in removing topsoil (his assigned task). He pointed out, however, that during this layoff he could have backfilled the lower pit with the bulldozer.

6. The discharge of Neil Berkley

On or about October 3, Respondent reduced Berkley's work hours. Prior to the election, Berkley worked 11 hours per day. After October 3, he worked the 4 hours between 4 and 8 p.m. running the loader.

Berkley, hired in December 1987, had a good record with Respondent. He had been laid off in the spring for 5 or 6 weeks but, at that time, had been assured that he was a ''fine employee'' and was being laid off only because of lack of work. On his return from layoff status, Berkley's hours ballooned to as much as 50 or more per week. In July, he was placed in Respondent's hospitalization plan. At the time of his October hours reduction, he was told not to worry because his services would also be required to unload a train due in that week. However, he was not called on to help out with that train.

Berkley's first problem with Respondent revolved around complaints from outside drivers that Berkley had not been available to load their trucks when they arrived at Respondent's jobsite on September 20 and 22. The matter was not mentioned to Berkley until some 2 weeks later on October 4. Larry Sanner mentioned it to him in the office that day. Berkley explained that his instructions were to leave before 8 p.m. if all the trucks on the list given him were loaded.

The record shows that Berkley's first instructions (from Judy Pletcher in the office) were to remain present until all trucks were loaded. Later, his instructions were modified. He was then to stay only until 8 p.m. and if some listed trucks had not arrived by that time, he was to leave. Additionally, as he explained to Sanner in the office, if all trucks listed were loaded prior to 8 p.m., he was to leave immediately and not wait around until 8 p.m. I find it clear that these instructions could create a situation where an outside truck could arrive and not find Berkley present to assist in loading. I note particularly that no provision covers Berkley's presence if an outside truck arrived a few minutes *after* 8 p.m.

On October 11, Berkley was directed to meet Larry Sanner at 12 p.m. There, he was told to go to the office where he met Sanner and Supervisor Galen Beechy. Sanner began by asking Berkley if he had greased the loaders on the previous day. Berkley said he had greased the Kawasaki loader but not the Huff. The reason for not greasing the latter machine was that it was raining.[14] Following this explanation Berkley was then accused of not greasing the loaders for the previous 3 days, an accusation which Berkley denied. Sanner then asked if Berkley was calling him a liar and Berkley asserted that Sanner simply had the facts wrong. Berkley noted that he had never before been accused of neglecting the greasing of the loaders or that the practice of not doing so in the rain was unacceptable.

Following this explanation, Sanner changed the subject once again. This time, he accused Berkley of falsifying his timecard by marking it to the effect that he had left at 8 p.m. when his actual departure time was not 8 p.m. Berkley replied that Sanner's information was incorrect. Sanner replied that he had ''witnesses.'' Berkley then explained the procedure he and other employees followed in marking their timecards pursuant to instructions received. If the time was after an hour but prior to 15 minutes after the hour, the hour was marked. Thus, 6:12 p.m. would be marked as 6 p.m. If the time was after the hour *and* after the 15 minutes interval, the half hour would be marked. Thus, 6:16 p.m. would be marked as 6:30 p.m. Sanner said that wasn't the way it was done but did not give any alternative procedure.[15] Berkley asked Sanner if he was going to be fired and said he would not quit. Sanner replied that no decision had been made as of yet. Berkley asserted that the interview was taking place because he was ''100 percent Union'' and Sanner was aware of that fact. Berkley left, asking that if he was to be fired, it be done in front of fellow employees.

Berkley reported for work at his normal time that afternoon. When he went to the office to get the loading list for the evenings work, Sanner told him he was discharged. Supervisor Beechy was present at that time. Berkley admitted to having ''lost his cool'' at this point. He warned Sanner to save his money because there would be a bargaining order and he was going to owe Berkley a lot of backpay and would have to put him back to work. Terry Pletcher came over at this point and suggested that Berkley was going to ''get'' Sanner out on the street. He then warned Pletcher not to threaten Sanner.

Berkley again asked to be fired before fellow employees Robertson and Vena, claiming he had a right to witnesses under the ''Weingard'' (*Weingarten*) rule.[16]

Sanner refused the *Weingarten* request and told Berkley he should leave because he was no longer an employee and had no right to be on the premises. In leaving, Berkley told Sanner he would get his some day. Pletcher asked if that was a threat. Berkley told Pletcher to ''shut up,'' that he had not

[14] Greasing the Huff in the rain meant climbing an 8-foot high mechanism rendered slippery by the rain with a flashlight in one hand and a greasegun in the other. On previous occasions the Huff was greased by two men assisting one another. This operation was performed in the dark.

[15] An examination of Berkley's timecards and the contentions made in Respondent's brief at p. 144 shows that Respondent's contentions are marginal in many instances. Thus, both the 10:15 and 8:44 observed times of Berkley's leaving depend on absolutely accurate watches. If Berkley's watch differed by a minute or minute and a half in the correct direction, his timecard entries accord with the rule he gave Sanner. There is evidence that on two prior occasions employees left assigned duties to go hunting and were not disciplined despite marking down the time. See Tr. 471 and 624.

[16] *NLRB v. Weingarten, Inc*., 420 U.S. 251 (1975). I make no finding in regard to whether Berkley was legally due *Weingarten* protection in light of the bargaining order antedating this incident, which I will recommend. I note that this was a discharge interview, not an investigatory one.

finished. Berkley continued on to say that Sanner would get his ''in a court of law.''

7. Appropriate bargaining unit and the Union's card majority

The parties agreed, and I find, that the unit appropriate here is as follows:

> All production and maintenance employees and truck drivers, employed by Action Mining, Inc. and Sanner Energies, Inc. at their facilities located in Somerset County, Pennsylvania and Garrett County, Maryland; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

There was a stipulation between the parties as to the identity of the employees in the appropriate unit at the times material. There are 61 employees so identified. They are apparently the same as those who voted in the September 20 election. Through July 21, 37 of the 61 had signed authorization cards. The following is an alphabetized list, prepared by the General Counsel, of the card signers and the date of the signatures:

Name	*Date Signed*
Arnold, Carl H.	6/29/88
Barr, Paul R.	6/29/88
Beal, Jacob E., Sr.	7/12/88
Berkley, Neil W.	7/18/88
Blank, Dwayne J.	6/29/88
Blank, Gary F.	7/21/88
Bowman, Kenny B.	7/16/88
Broadwater, Randy	7/14/88
Caton, Owen W.	6/29/88
Coleman, William	6/29/88
Donaldson, Robert L.	7/20/88
Groff, Kenneth L.	6/28/88
Hay, Scott N.	7/20/88
Hay, Vaughn E.	7/14/88
Hutzell, Paul	7/14/88
Kiser, William Jr.	7/13/88
Klink, Daniel G.	7/14/88
Lee, Frank	6/29/88
Marker, Scott	6/29/88
Mishler, Richard	6/29/88
Pritts, Earl	7/18/88
Robertson, James	7/20/88
Romesberg, Steven L.	7/20/88
Sanner, James R.	6/29/88
Sanner, Paul	7/21/88
Sanner, Robert E.	7/12/88
Sanner, Truman R., Jr.	6/29/88
Savage, Ervin P., Jr.	7/20/88
Shaffer, Dewey	6/29/88
Vena, Tony	7/20/88
Warnick, Marvin	7/12/88
Warnick, Sylvan	7/19/88
Wright, Dennis W.	6/28/88
Wilt, Kenneth R.	7/18/88
Yutzy, David E.	7/20/88
Yutzy, Joseph F.	6/29/88
Bishop, Daryl	7/20/88

There is no evidence that any employee sought to retrieve his card after signing it. The record shows (and Respondent does not contest) that each was properly validated at the hearing. There is no evidence of coercion of individual employees to induce them to sign an authorization card and, indeed, Respondent does not claim any such coercion. The cards are headed in bold print ''AUTHORIZATION FOR REPRESENTATION.'' The relevant language to which the employees affixed their signatures is as follows:

> I, the undersigned employee of _____, authorize the UNITED MINE WORKERS OF AMERICA to represent me as exclusive collective bargaining agent in all matters pertaining to wages, hours, terms and conditions of employment. This authorization cancels any similar authority previously given any other person or organization.

The cards nowhere mention the possibility of an election, and are thus single-purpose instruments.

Respondent makes two attacks on the usefulness of certain of the authorization cards to reflect genuine employee sentiment. With regard to the cards of James Sanner, Marvin Warnick, Sylvan Warnick, Paul Sanner, Vaughn Hay, Randy Broadwater, Kenneth Bowman, and Scott Hay, Respondent claims their cards cannot be included in the total because of their postsignature antiunion activities. Respondent claims that these eight individuals joined a ''vote-no'' committee and that this conduct voids their card selection of the Union as a collective-bargaining representative. Whatever the merits of this claim in a different fact context, I cannot find that it has any merit under the facts of this case. These cards were signed on July 21 or before. Respondent learned of the union campaign on or about July 25 when it received notification that a petition had been filed with Region 6 of the Board. As will be seen, Respondent's supervisors and owners immediately began a campaign of 8(a)(1) activity designed to discourage employee sentiment for the Union. Much later (on August 22) Respondent attempted to disavow these practices, but, as will be seen, that disavowal was ineffective because it was followed almost immediately by further 8(a)(1) activity on Respondent's part. In sum, I do not find it surprising that a certain number of card signers may, indeed, have switched sides as a result of a campaign that featured frequent threats that Respondent would shut down its operations. That, after all, was the result Respondent desired to achieve as a result of the threats. Its partial success in achieving that objective does not, however, invalidate cards signed prior to the start of Respondent's illegal activities. To hold otherwise strikes at the basis of the *Gissel*[17] rationale underlying the use of cards to safeguard employee sentiment in a context of unfair labor practices.

Respondent's second (and main) attack is directed at some 22 cards signed at union meetings. Respondent claims that these cards were signed as a result of ''misrepresentation and deceit.'' The deceit does not involve the traditional misrepresentations about the purpose or use of the cards. Respondent contends, instead, that the Union's arguments addressed to the employees present were false and misleading and were

[17] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

designed to persuade employees to sign. Analogizing this situation to *Hollywood Ceramics Co*., 140 NLRB 221 (1962), and a successor case, *Shopping Kart Food Market*, 228 NLRB 1311 (1977), Respondent contends that the Union misrepresented the Respondent's financial situation and misused certain government reports to given an inaccurate picture of what Respondent could afford by way of wages and benefits. No claim is made that the government reports were altered, only that they were irrelevant to Respondent's situation.

The cases cited by Respondent all involve assertions made during the course of a contested campaign about union representation. Respondent cites no case and I can find none where the holdings in *Hollywood Ceramics* or any of its successors were applied to the preliminary card signing stages of a campaign. A union may well engage in some puffery at this stage. A labor campaign, at least in its beginning stages, is not, however, a precise academic inquiry into the employer's finances or practices. Card signing is normally followed by a campaign where both sides can explain their positions and by a secret-ballot election where employees render their judgement on the basis of what they have learned. The employer who avoids unfair labor practices and makes his arguments on economic and other facts has nothing to fear from this process. *Gissel*, supra. Respondent incorrectly interprets the Court's discussion in *Gissel* of misrepresentation and fraud in the card signing process. That discussion involves misrepresentations about the purpose and use of cards. The Court did not intimate, nor do I believe it intended, that a strict standard of scientific accuracy apply to union statements at the time of card signing about the desirability of organizing the employer's work force. Accordingly, I find that the Union possessed a card majority in an appropriate unit as of July 21.

IV. ANALYSIS AND CONCLUSIONS

For the reason set forth below, I find that Respondent has violated Section 8(a)(1) and (3) of the Act. I further find that Respondent's attempt to disavow its previous violations of the Act on August 22 was ineffectual.

I credit the General Counsel's witnesses,[18] and the record reflects that on receiving information from the Board's Region 6 that a petition had been filed by the Union, Respondent's owners and supervisors immediately began a campaign to discourage employee union support. Thus threats of plant closure were made to Blank on July 25, Groff an July 26, Gary Blank on July 25, Bishop on July 27, Marker on July 27, and Yutzy on August 1. Similar threats were made just before the election to employees Vena, Robertson, Berkley, and Savage. None of the disputed remarks were backed up by any rational economic argument. See *Gissel*, supra. Nor were the remarks of an interrogative nature made to known union supporters as a result of Respondent's initial consternation at the advent of the Union. *Rossmore House*, 269 NLRB 1176 (1984). The threats involved in these contacts clearly violated Section 8(a)(1) of the Act. *Montgomery Ward*, 290 NLRB 981 (1989).

[18] These witnesses gave evidence of excellent demeanor while testifying and their testimony was mutually supportive about the various statements attributed to Respondent.

Certain of the above-cited conversations also involved interrogation of employees about their union sentiments or activities. Thus Wyant asked Scott Marker about his involvement and where the Union held its meetings. In early September Doug Sanner asked Berkley how he ''felt'' about the situation and the Union. In none of these incidents had the employee previously exhibited support for the Union. Cf. *Rossmore House*, supra. In fact, Marker had refused to disclose his position and was agitated about accusations of union support.

Respondent's supervisor, Terry Pletcher, on three occasions created an impression of surveillance. He told James Sanner that Scott Marker was a main instigator of the Union several days prior to July 26.[19] On July 27 and 28, Pletcher told employees Darryl Bishop and Dwayne Blank that the Respondent knew who had gotten the Union started. Pletcher's statements would lead employees to believe that union activities were under active surveillance by Respondent. *Gupta Permold Corp*., 289 NLRB 1234 (1988).

As previously stated, Respondent posted a disavowal of unfair labor practices on August 22. (R-L.) On its face, the disavowal is explicit and detailed. Were its facial validity the only matter at issue, I would, indeed, hold that Respondent had successfully disavowed the unfair labor practices[20] committed up to August 22. Respondent did, however, continue to commit unfair labor practices following August 22. Several days later, Respondent posted a letter to its employees. In that letter it commented that it was against the Union ''because we are convinced that it could seriously affect our being able to stay in business.'' (G.C. 26.) The letter contains economic support, data, or argument to buttress this conclusion. No objective fact is cited nor is the latter phrased in the form of a reasonable belief as the consequences of unionization. Such an assertion steps over the line into forbidden territory. *Gissel*, supra. The letter does not cast its prediction in the form of a possibility. *Central Broadcast Co*., 280 NLRB 501 (1986) (''I am not saying a strike is inevitable'').

That Larry Sanner, the author of the letter, was aware of economic facts to back up his prediction only renders his failure to make them explicit in the letter additional evidence of the effect sought to be produced. See Tr. 1173–1177, 1296. I find the letter violative of Section 8(a)(1) if the Act. *EMR Photoelectric*, 251 NLRB 1597, 1604 (1980).

Early in September, Respondent began holding small group meetings in which it discussed unionization and its consequences. In these meetings Respondent did present objective data and facts back up its arguments. This was, however, 2 to 3 weeks after the August 25 letter. I cannot find that this belated presentation cures the deficiencies of the August 25 communication. Indeed, it gives more the picture

[19] See Tr. 1406–1408.

[20] The General Counsel moved in his brief to amend the consolidated complaint to add an allegation of solicitation of grievances. I deny the motion on the grounds that it is untimely (Respondent had no opportunity to brief and argue the matter) and that the generalized inquiries about ''gripes'' attributed to Respondent's supervisors do not rise to the level of a solicitation of grievance with an implied or explicit promise to remedy such grievances. In fact, the Respondent continually refused to remedy known employee grievances about wages (which had been cut before the campaign). *Varco, Inc*., 216 NLRB 1 (1974).

of a Respondent playing it close to the line on this issue, hoping to benefit both from illegal and legal communications and, at last, hoping the latter will cloak the former.

On September 19, in a talk to all employees, Respondent referred, again without backup facts, to the possibility that its customers might go elsewhere in the event of unionization, supposedly because of a fear of strikes which might cut off coal supplies. This statement violated Section 8(a)(1) of the Act. See *Harrison Steel Castings Co*., 262 NLRB 450 (1982).

The Respondent committed further unfair labor practices the day of the election. That day Larry Sanner approached, at different times, employees Robertson, Vena, Berkley, and Savage. In the process of ''selling'' Respondent's profit-sharing plan, Sanner asked two of them what made them think they would work for 2 weeks or 2 months under the Union. On another occasion that same day he told two other employees that there was no guarantee they'd work long enough to qualify under a union benefit plan. These threats of loss of employment violate Section 8(a)(1) of the Act. As Respondent continued its course of violative behavior after the August 22 disavowal, that disavowal was ineffective and I so find. *Passavant Memorial Hospital*, 237 NLRB 138 (1978), and *Facet Enterprises*, 290 NLRB 152 (1988).

The Union (as Petitioner in representation Case 6–RC–10066) asserts that the election should be set aside and its main argument revolves around the 8(a)(1) activity outlined above. As I have found that activity violative of the Act, and since it occurred during the so-called ''critical period'' between the filing of the petition and the election, and further because of its extent among the employees and the nature of the threats (closure, loss of employment) I find that this 8(a)(1) activity requires setting aside the September 20 election. *Wex-Tex of Headland, Inc*., 236 NLRB 1001 (1978). The Union also contends that Respondent allowed antiunion activities during working hours by its employees. In one of these incidents the Geyer-Klink conversation several weeks before the election—I find that Geyer was attempting to dissuade Klink from his support of the Union. While Supervisor Beechy was in the general area, he was at least 20 yards from the conversation, thus I do not find that he can be charged with knowledge of its content. While the incident was not without interest as bearing on Respondent's practices in keeping the men working and preventing ''goofing off,'' I cannot find that it establishes that Respondent permitted campaigning on the job. Similar considerations apply to a Stevanas-Klink conversation around this same time. No one in management heard it or observed it.

The Union also relies on the five-man conversation after the Respondent received the petition in July. The five men did attempt to dissuade employee Klink from supporting the Union, but again, no management official witnessed this conversation nor is there any evidence that management sent them to Klink for that purpose. (See Tr. 1055.) While it is true they told Klink the road was blocked, without more I do not find the statement to be of a threatening nature. That it was dark at the time may add a dramatic nuance to the scene but adds nothing to its legal effect. Klink had a conversation with fellow workers on the jobsite on an evening shift. Although it was during working hours, it was not observed by management. Thus I do not find either the conversation or the alleged ''threat'' about the road being blocked a violation of the Act as contended by the Union and the General Counsel.

A final contention by the Union is that the day of the election a group of six or eight individuals wearing antiunion paraphernalia was standing at the fence around the building in which the voting took place. These individuals were talking among themselves but did not confront or accost anyone arriving to vote. The Union claims that employees not wearing antiunion insignia were told to leave the ''polling area.'' No employees, as the Union alleges, were denied access to the polling place. The gathering in question was considerably outside the polling place. No evidence was presented to show that management placed the group there. I find this incident failed to rise to a violation of Act. While the antiunion insignia may have made their preferences clear, that insignia was seen at many places that day and it was no secret that many employees opposed the Union.

I find that the layoffs, reductions in hours, and denial of advance time for hunting purposes inflicted on Marker, Yutzy, and Lee occurred because of their union activities. Their union support had been open and well known to Respondent. Respondent, through Terry Pletcher, conceded that it suspected Marker to have been involved with the Union's petition. Some time later, the three openly displayed union insignia. The day of the election Marker, Lee, and Yutzy were part of a union support line near the polling area. (See Tr. 450 and 675.) Respondent's antiunion animus is well documented in the form of the threats directed to employees immediately on the filing of the Union's petition in July. I am particularly persuaded by the fact that these changes occurred only with reference to 3 or 4 individuals out of a work force of 61 employees, and these individuals all had made a clear showing of union support. It had rained before on Respondent's operations but for the first time ever, as far as this record shows, alternative work could not be found for Lee, Yutzy, and Marker. While one of these men had, on prior occasions, reported on his own to the mechanics on rainy days, Respondent did not develop an interest in this practice until after the display of union support by the employee involved. Respondent's problematical explanations for the changes are confined in the case of the layoffs to an account of the deliberations about whether other job tasks were available to be performed when it rained. I find it very unlikely that such tasks could be found prior to the election but not after it for 3 employees out of 61, who had a displayed of their union support. I do not credit Respondent's explanations.

The change in buildup time for hunting was unsupported by any business reason and, suspiciously, was not announced to all employees but only those who asked. There is evidence that employees who did not support the Union were allowed to build up time during the regular workweek in the manner prescribed before the election. Thus Sylvan and Marwin Warnick were seen working late during the week for this purpose.[21] (See Tr. 467, 545–547.) The change in Lee's hours (a reduction) was apparently predicated on the hope that he would leave due to the attendant difficulties in operation of his small taxidermy business. Lee was extraor-

[21] I do not credit Respondent's explanation that it changed the policy because Supervisor Beechy who had operated under it for 7 or 8 years suddenly expressed confusion about it in October.

dinarily trained and experienced in the coal business despite the fact that he had not been employed as long as others. There is no evidence that Respondent assigned work on the basis of seniority, and its asserted business reason (lack of work) for assigning Lee to the crusher rings hollow in the light of that experience.

I find that the various layoffs discussed here, the change in ''hunting time'' policy and the postelection assignment of lower, fluctuating, and irregular hours to Lee violated Section 8(a)(3) and was undertaken in an effort to rid Respondent of three outward union supporters. *Nissen Foods (USA) Co*., 272 NLRB 371, 388 (1984).

Neil Berkley gave the appearance of being an excellent employee prior to the start of the union campaign. Although laid off once in March, he was assured by Larry Sanner that his work was good. On his return in May he was scheduled to work 50 or more hours per week. In July, Respondent placed Berkley into its insurance and hospitalization plan. This was done with no request from Berkley. Alleged deficiencies in his work performance in June were never brought to his attention. During the campaign, Berkley continually raised questions with Respondent about wages, hours, and benefits. Indeed, in a conversation with one of Respondent's officials, he announced that he was for the the side which would give the best deal.

The day of the election, Berkley clearly rejected Larry Sanner's arguments about the superiority of the Respondent's profit-sharing plan. This type of behavior during an organizing campaign, as the General Counsel asserts, closely identifies an employee with union support. *Bell Halter, Inc*., 276 1208, 1218 (1985) (''Thus, faulting an employee . . . for his attitude or belief that the company owes him more is, in the absence of other explanation, synonymous with faulting him for his union support''). Berkley's clear and explicit desire for higher wages and benefits from Respondent inevitably stamped him as one quite likely to vote for the Union.

Following the election, Berkley's status with Respondent almost immediately changed for the worse. On October 3, he was put to operating the loader. This resulted in his obtaining only about 36 percent of the hours he had previously accumulated (reduction from 11 hours to 4). While he was promised additional time on a train loading job, Respondent failed to assign him that work. Prior to the reassignment, Respondent had received complaints on September 20 and 22 from two outside truckers about Berkley, claiming he was not present to load their trucks even though (as they claimed) they were on time. Respondent did not say anything to Berkley about this until October 4, some 2 weeks later. Instead of getting Berkley's explanation immediately, Respondent began covertly watching his activities, taking care to have supporting witnesses available. This heightened supervision of an employee has been found unlawful so that an employer might not accumulate genuine incidents of misconduct to hide discipline that is unlawfully motivated. See *FDP Medical Computer Systems*, 284 NLRB 1286, 1296 (1986).

The interviews with Berkley on October 2 and 11 showed Respondent shifting from one complaint to another—the outside truckdrivers, the marking of Berkley's timecards, the failure to grease a machine in the rain—and shifting each time Berkley gave a rational explanation based on prior practice or instructions he had been given. That Respondent was frustrated by Berkley's explanations is reflected by the timecard incidents, where Larry Sanner did not explain the proper timecard procedure but only announced ''that wasn't the way it was done.'' I have previously commented on the narrowness of Respondent's complaints about the timecards, dependent as many of them do, on intervals of a minute or minute and a half. Significantly, Berkley, previously a desirable employee, had never been warned about his alleged timecard errors. Other employees agreed with his interpretation of the timecard rules. Even though Respondent may characterize its surveillance of Berkley's work as ''investigation,'' it is clear that such a desultory investigation would not result in uncovering the truth because it was directed at supporting Respondent's contentions. See *K & M Electronics*, 283 NLRB 279, 290, 291 (1987).

Berkley's October 11 statement that he would not quit and his desire to be discharged before fellow employees appear to have triggered his discharge in the immediate sense. The General Counsel has set forth a strong prima facie case that Berkley was discharged in violation of Section 8(a)(1) and (3). Respondent's half-hearted investigation and failure to demonstrate decisively just where Berkley fell short does not rebut that case. *Wright Line*, 251 NLRB 1083 (1980). Although Berkley ''lost his cool'' (as admitted) during the discharge process, I do not find on this record that he did or said anything that would block his reinstatement to Respondent's employ. His threats were of legal action, not physical harm.

V. REMEDY

I find, on this record, that a bargaining order is necessary to protect employee sentiment from the effects of Respondent's unfair labor practices. In my opinion the effect of those practices cannot be undone by normal Board remedies and the direction of second election. I note first of all that the overwhelming number of Respondent's threats involved closure of the operation and attendant job loss. Such threats have been found to have a particularly poignant effect on employees. See *Gissel*, supra. In the peculiar circumstances of this case, many of these threats were made not by ordinary supervision, but by co-owners of the mining operation—the very individuals with immediate power to turn those threats into reality. Not supervision but ownership was speaking. See *Plastic File Products Corp*., 238 NLRB 135, 137 (1978), and *Mayfield Produce Co*., 290 NLRB 1083 (1988) (speed of respondent's retaliation, nature of threats, extensiveness of campaign violations, fact that violations committed by ownership). I shall recommend that the election of September 20 be set aside, and that the bargaining obligation begin on July 21 when the Union obtained a majority of cards. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

I shall recommend that the Respondent be ordered post the regular notices in places where notices to employees are normally placed. I shall also recommend that Respondent be ordered to reinstate employee Neil Berkley, with backpay and interest both for his discharge and the hours cut on October 3.[22] Backpay with interest will also be recommended for

[22] Under *New Horizons* interest is computed at the ''short-term federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1,

Lee, Yutzy, and Marker for their several layoffs in October and November.

Considering the nature and extent of the unfair labor practices found in this proceeding, particularly the threats of closure, and the fact that Respondent continued its illegal course of conduct following the election, I shall recommend to the Board that a broad cease-and-desist remedial order be issued against Respondent. *Hickmott Foods*, 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW[23]

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By reducing the hours of employee Neil Berkley and discharging him, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By temporarily laying off employees Marker, Lee, and Yutzy at various dates in October and November, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By changing the rules about ''build-up'' time for hunting, Respondent has violated Section 8(a)(1) and (3) of the Act.

6. By threatening its employees that its operations would close down if the Union was successful in its organizing drive, Respondent has violated Section 8(a)(1) of the Act.

7. By threatening its employees that their jobs would not last long if the Union was successful in its organizing efforts, Respondent has violated Section 8(a)(1) of the Act.

8. By informing its employees that it knew who the union instigators were, Respondent created the impression of surveillance, in violation of Section 8(a)(1) of the Act.

9. By threatening its employees that its customers would go elsewhere for coal, thus affecting their employment adversely, Respondent has violated Section 8(a)(1) of the Act.

10. Respondent's attempted disavowal of unfair labor practices on August 22 was of no force or effect.

11. By refusing to recognize and bargain with the Union on and after July 21, Respondent has violated Section 8(a)(5) of the Act.

12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[23] These conclusions cover most of the objections filed by the Union in Case 6–RC–10066. Any objection not mentioned or covered here was found to be without merit or lacking support in the record.

Patricia J. Scott, Esq. and *JoAnn F. Dempler, Esq.*, for the General Counsel.

Richard P. Weintraub, Esq. and *Richard D. Wayne, Esq. (Hinckley, Allen, Snyder & Comen)*, of Boston, Massachusetts, for the Respondent Employer.

Michael Dinnerstein, Esq., of Washington, D.C., for the Charging Union and Petitioner.

SUPPLEMENTAL DECISION

Brief History

RUSSELL M. KING, JR., Administrative Law Judge. These consolidated cases were heard by me in Somerset, Pennsylvania, in May and July 1989. My initial decision was issued on September 18, 1990. Thereafter the Respondent filed exceptions and a supporting brief with the Board, and the General Counsel filed a brief answering the Respondent's exceptions. On July 11, 1991, the Board remanded the cases back to me for further review of the record, reconsideration of and further findings of fact and specific credibility determinations, and, if appropriate, new conclusions of law and recommendations regarding certain 8(a)(3) and (1) violations initially found by me. The consolidated amended complaint (the complaint), which issued January 11, 1989, alleges various violations of the National Labor Relations Act[1] (the Act) occurring during and after the Union's attempt to organize the Respondent (the Company). The Union's campaign began in the spring of 1988, culminating in a Board-conducted election on September 20, 1988.[2] The Union lost the election by a 34 to 27 vote.

I. THE ALLEGED UNFAIR LABOR PRACTICES INVOLVING SECTION 8(A)(3) AND (1) OF THE ACT

A. *The Layoffs of Employees Marker, Lee, and Yutzy*

1. Testimony and evidence

Paragraph 10(a) of the complaint alleges the unlawful layoff of employee Frank Lee on September 25. Paragraph 11 of the complaint alleges the unlawful layoff of employee Joseph Yutzy on September 25, October 24, and November 7. Paragraph 12(a) of the complaint alleges the unlawful layoff of Scott Marker on or about September 25, and on or about November 7, all in violation of Section 8(a)(3) and (1) of the Act.

Employee Frank Lee first contacted the Union in April, and the first meeting was held in May, and was attended by employees Scott Marker, Frank Lee, Joseph Yutzy, and Denny Weigel. Marker began working for the Company in April 1984, and worked as a heavy equipment operator until he left the Company in March 1989. According to Marker, there were organizational meetings on a regular basis each week on Wednesday nights, and he attended almost all of them up until the election. Marker also talked to other employees about the Union, helped to get union authorization cards signed, and distributed union literature. Marker signed his authorization card at an organizational meeting on June 29, and he was an active and outward supporter of the Union. Marker testified that on July 26 or 27 he had a conversation with Supervisor David Wyant wherein he again claimed that Foreman Terry Pletcher was saying bad things about him. Terry Pletcher was married to Judith Pletcher, a part-owner of the Company. Marker testified that he then told Wyant that ''From this day on I am one hundred percent for the Union.'' Marker related that he usually operated a

[1] 29 U.S.C. § 151 et seq.

[2] All dates hereafter are in 1988 unless otherwise stated.

pan,[3] but that on occasion it would be too wet to operate the pan, and that he would ''always'' be assigned other work. Marker indicated that this would occur approximately 10 times throughout a year. Marker conceded that over a period of 4-1/2 years, he ''missed a day or two,'' when it was too wet to pan and there was not any other work for him to do. Marker also testified that the Sunday following the union election (September 25), Larry Sanner told him that it would be too wet to pan the following day (Monday), and that there was no other work for him to do. Marker indicated that on Monday afternoon, he was called and told that there was nothing for him to do on Tuesday because a dozer had broken down. Marker testified that during his entire employment, that a dozer (working in conjunction with a pan) had broken down 25 and that he had always continued operating his pan. Marker also did not work on Wednesday, and on Thursday afternoon he received a call to report to work Friday. Marker indicated that he had been working in pit 27, and when he returned on Friday, he observed that someone had been operating his pan in his absence because ''there was more dirt on the pile where I pile my dirt.''[4] Marker testified that in early November, and on a Sunday evening, Terry Pletcher called him at home and said that it was too wet to pan the following day (Monday), and Marker added that he did not work the following Tuesday or Wednesday.[5]

Joseph Yutzy had worked for the Company since December 1981, and was presently operating a dozer. Yutzy, along with employees Denny Weigel, Frank Lee, and Scott Marker were the employees who originally got together and contacted the Union. These employees also attended the first union meeting, with Union Representative Robert A. Moore. Yutzy related that there were other union organizing meetings once a week leading up to the election (September 20), all of which he attended. Yutzy testified that during the union campaign he wore a union hat, had a union license plate on his pickup truck and union ''stickers'' on the bumpers of his pickup truck, together with union stickers on his lunchbox thermos, and water jug. He also wore a union hat. Yutzy also added that after he voted in the election, he carried a sign which stated that he had voted ''Yes.''

Although Yutzy presently operated a dozer, in the past he had run a pan, a loader, a rock truck, a backhoe, a drag line, and ''drilled'' on several occasions. Yutzy testified that four or five times during his employment he had been told that it was too wet to operate the pan. Yutzy added that prior to the election, he had never been laid off or told not to come to work because it was too wet to operate the pan, but in such cases he would run a dozer, a rock truck, or anything to get his time in. Yutzy indicated that on Sunday, September 25, Foreman Terry Pletcher called him at home and told him that it was too wet to run the pan and that he would not have anything for ''us.'' Yutzy indicated that the following Monday, Tuesday, Wednesday, and Thursday he did not work.[6] Yutzy testified that on Monday, October 24, Dave Wyant told him that it was too wet to run the pan, and to go home and they would call him when they wanted him to come back to work. Yutzy could not remember how many days he was off work, but thereafter he was called and asked to report back to work, running a dozer. Yutzy indicated that it was never too wet to run a dozer, and that he had run a dozer when it was too wet to operate the pans.[7] Yutzy related that on Sunday, November 6, he was called by Roberta Wyant (office secretary and wife of Supervisor David Wyant) who told him that it was too wet to run the pan and not to report back to work until he was notified.[8] Yutzy indicated that he then telephoned Larry Sanner to ask for alternative work, and Sanner replied that he would talk to Foreman Galen Beechy to see if he had any work, and if so, Beechy would call him direct.[9] Yutzy received no phone call from Beechy, and the following evening (Monday) he and his wife had visited her grandmother's gravesite and on the way back they stopped by pits 18 and 22. According to Yutzy the ''drag'' at pit 22 was working and the drag at pit 18 was sitting. Yutzy testified that he felt he could have been operating the pit 18 drag. Yutzy indicated that he was thereafter called back to work but declined because he had other plans.[10]

Frank E. Lee was hired by the Company in May 1987. Lee testified that his duties were that of an oiler, and he also ran a dozer, loaded coal, cleaned coal, worked at the tipple, ran a drag line, and helped as a driller's helper. In July 1988 Lee indicated that he became a permanent dozer operator.[11] Some time in April or May 1988 certain employees began to talk about a union and according to Lee, he was the one who was nominated to make the first call to Union Representative Robert Moore. In addition to himself, Lee indicated that the other initial union supporters were Denny Weigel, Scott Marker, and Joe Yutzy. Lee testified that he attended union organization meetings on a regular and weekly basis, and also put stickers on his thermos and his work vehicle, and wore a union hat. Lee also helped hold a union banner on the day of the election.

Lee testified that on one occasion his dozer ''went down'' and for a week, during which time he did mechanical work

[3] A ''pan'' carries topsoil from a pile to the area pit being reseeded, spreading the topsoil out in a rough fashion. A bulldozer (dozer) then smooths out the topsoil.

[4] Foreman Galen Beachy later testified that some time during the week of September 26–30, Marker's pan was moved approximately 100 yards in order that a ''dragline'' could be moved. Beachy also testified that he offered Marker Saturday work to make up the time he lost the week of September 25, but that Marker turned this down.

[5] Marker gave no explanation as to why he did not work Tuesday and Wednesday. Foreman Terry Pletcher testified that he did look for other work for Marker, checking with Larry Sanner (president of Action Mining) and with Foreman Galen Beechy, but no other work was found.

[6] Pletcher testified that he did look for other work for Yutzy the week of September 26, checking with Beechy, and mechanics Paul Sanner and Bill Coleman.

[7] There is other testimony in the case to the contrary, i.e., that when it was too wet to operate a dozer, a pan could operate.

[8] In his testimony, Wyant confirmed that he had his wife call Yutzy.

[9] Supervisor Wyant testified that on November 5 or 6 (Saturday or Sunday), he received a phone call from Larry Sanner, seeking alternative work for Yutzy.

[10] According to the testimony of Larry Sanner and Dave Wyant, Yutzy was called to come to work at noon on Wednesday (November 9) but refused, and also failed to show up for work Thursday because his truck broke down. Yutzy did work Friday, November 11.

[11] Foreman Terry Pletcher, in his testimony, confirmed that Lee was hired as an oiler, but never became a ''permanent'' dozer operator.

at the direction of Supervisor Wyant. Lee testified that during the summer of 1988 there were times when it was too wet to spread topsoil with the dozer, but that you could then ''go over and back fill.'' When asked if he did that on occasions, Lee answered, ''No, we didn't, no.'' The union election was held on September 20 and Lee testified that the following week he was laid off by Foreman Terry Pletcher, who called him and said that they were going to ''park'' the dozer because it was too wet, and that he would let him know when they wanted him to come back to work.[12] Lee related that the following week, on Sunday night, Pletcher called him and indicated that the dozer job was ''more or less completed,'' but that he should report to work in the morning to jobsite 200 to crush coal, which he had done a ''time or two'' before. Lee testified that when he was operating the dozer he was receiving $9 per hour and getting 45 hours a week, but that when he went on the crusher he went to $7.50 per hour at 8 hours a day. Lee conceded that there were times that operation of the dozer was affected by weather when ''spreading topsoil . . . doing fine grade work like that.'' Lee added, however, that weather did not affect ''backfilling and things like that,'' and that usually on a strip job ''there's always some backfill work to do.''

During cross-examination Lee conceded that a ''large'' number of employees had union stickers on their vehicles and on their thermoses, and that at least eight or nine other employees wore union hats. Lee also did not dispute the fact that it was too wet for the dozer to be operated the week that he was laid off, and conceded that the week before he was laid off he knew the dozer job ''was coming to a completion.''

The union election was held on Tuesday, September 20. In the evening of Sunday, September 25, there was a company meeting at the home of Larry Sanner.[13] The meeting was attended by Douglas Sanner, Terry and Judith Pletcher, and Galen Beachy. The status of work in the various company pits were discussed. Also, over the weekend (September 24 and 25) it had rained very hard, after a long summer drought.[14] Foreman Beachy and Terry Pletcher and Larry Sanner discussed the weather and the ground situation at the various pits. At that time employee Marker had been operating a pan applying topsoil at pit 27. Employees Yutzy and Lee were working at pit 21 putting in subsoil and topsoil. Yutzy was working with a pan, and Lee with a dozer. It was then determined by Beachy and Pletcher that because of wetness, Marker, Yutzy, and Lee could not work at their respective pits for several days. Beachy testified that he and Pletcher discussed ''for a long period of time'' what options were available to assign the three employees to other work so they would not lose time. This discussion also involved what the mechanics were currently doing. Beachy and Pletcher determined that there was no other work available for Marker, Lee, and Yutzy, Beachy describing the situation to be ''very abnormal.'' Beachy described the weather from Monday through Thursday (September 26–29) as periodic rain showers with ''no sunshine at all to dry the ground.'' Accordingly, Marker, Yutzy, and Lee were called at home that (Sunday) night and told not to report for work on Monday. Throughout the week, Beachy checked pit 27 and determined that there was no work for Marker at that site until on Thursday afternoon when he discovered that the surface was somewhat drier. That night (Thursday) Marker was called to report to work the following day (Friday, September 30), which he did. Since the Company had lost time in their reseeding schedule, Beachy asked Marker to work on Saturday (October 1), but Marker refused. Terry Pletcher testified that he checked the work area at pit 21 twice a day each day that week and that the drying out process did not commence until ''some good weather'' on Thursday. Pletcher further indicated that throughout that week he called around looking for other work but there was none available at any other jobsite or with any of the mechanics. Pletcher testified that on Thursday night (September 29) he called Yutzy and told him to return to work on Friday. Yutzy did work on Friday with the pan at pit 21, and he was assisted by senior dozer operator Earl Pritts, who had become free after completing other work. Pletcher indicated this is the reason Lee was not called to come to work on the dozer at pit 21 on Friday. Pletcher further indicated that he offered Yutzy work on the following day (Saturday), but that Yutzy turned the offer down.

On the weekend of November 5–6, it rained as it had on the weekend of September 24–25.[15] Five of the six union charges had already been filed and served on the Company. The charge in Case 6–CA–21299 (filed October 3 and served October 4) alleged, in part, unlawfully ''denying work to some bargaining unit employees,'' who are actively involved in the union organizing efforts, while permitting other bargaining unit employees, who are members of the '''Just Vote No' committee, to work.'' This allegation involved the September 26 layoffs.[16] Sunday evening (November 6) Larry Sanner met with Douglas Sanner, Terry and Judith Pletcher, and Galen Beachy at his home. Larry Sanner knew that pans would not be able to operate the following day (Monday, November 7). Mindful of the union charges which had already been filed, Sanner wanted his supervisors to be certain

[12] Pletcher testified that he looked for other work for Lee that week, checking with Larry Sanner and Galen Beechy, but no work was found.

[13] Action Mining, Inc. and Sanner Energies, Inc. were affiliated businesses, constituting a single integrated business enterprise, and a single employer within the meaning of the Act. The Company was owned by five siblings. Larry Sanner was president of Action Mining, and Douglas Sanner was president of Sanner Energies. Judith Pletcher was treasurer of Action Mining and Roberta Wyant was a secretary or clerical for the Company. The fifth sibling, Pamela Moore, was not active in the Company. Foreman Terry Pletcher is the husband of Part-Owner Judith Pletcher. Supervisor David Wyant is the husband of Part-Owner Roberta Wyant. Foreman Galen Beachy is not related to any of the owners.

[14] This fact is undisputed in the case.

[15] This fact is also undisputed in the case.

[16] The sixth and final charge (Case 6–CA–21390) was filed and served on the Company on November 8. This charge alleged discrimination against employees who had supported the Union in many different ways, since on or about September 26. An amended charge in Case 6–CA–21390 was filed by the Union on January 10, 1989, alleging general discrimination against employees Lee, Yutzy, and Marker since September 26 because of their concerted activities on behalf of the Union. The consolidated amended complaint was issued on January 11, 1989, alleging the unlawful layoff of Marker on September 25 and November 7 (par. 12(a)), the unlawful layoff of Lee on September 25 (par. 10(a)), and the unlawful layoff of employee Yutzy on September 25, October 24, and November 7 (par. 11).

as to whether or not other work would be available. At that time employee Marker was operating a pan at pit 30, and employee Yutzy was operating a pan at pit 28. Supervisor David Wyant, who supervised Yutzy at pit 28, was not at the meeting Sunday evening (November 6) at Sanner's home. Thus, Sanner telephoned Wyant Sunday evening and asked whether or not there was other work available at pit 28. Sanner learned from Wyant that there was no other work available, and that he (Wyant) had already called Yutzy and told him not to report Monday, November 7.[17] Foreman Beachy testified that ''We went through the same options that we had done before in September and tried to check where our mechanics were, and what they were doing, to the best of our ability, and checked any other places where we may be able to assign them to work . . . [but] there was no other place that we could put these two people [Marker and Yutzy] to work at that time [sic] feasible.'' On the night of November 9 (Wednesday) Foreman Terry Pletcher notified Marker to report for work the following day, as the sun had dried out the area. Marker worked and operated his pan on Thursday and Friday, but as he conceded in his testimony, he rejected Pletcher's offer to work on Saturday, November 12, to make up some of the lost time. Pletcher testified that he also offered Marker the opportunity to work on any Saturday to make up the time that he had lost, with the stipulation that Marker would let him know in advance. By noon Wednesday, November 9, it had become dry enough to use a pan and Yutzy was called at home to come in to work but he did not report either on Wednesday or Thursday, November 9 and 10. Yutzy did return to operate the pan on Friday, November 11. Regarding Saturday work, during his testimony Yutzy was asked whether he requested permission to make up any time on Saturday, November 12, to which he conceded that in the past he had requested to work some Saturdays, but that he did not recall whether he made such a request for Saturday, November 12.[18]

During October, David Wyant was the supervisor over employee Yutzy at pit 28. Wyant testified that he arrived at pit 28 at 6 a.m. on Monday, October 24. According to Wyant, the other employees (including Yutzy) were already there. It had rained the night before and Wyant testified that ''there was water laying everywhere,'' and that he thus concluded that it was too wet for Yutzy to operate the pan that day. Wyant indicated that he explained this to Yutzy, adding that he did not have anything else for him to do that day and that ''We'll make up the time later.'' Later that morning Wyant told Yutzy that he would let him know when it was dry enough to pan. Wyant testified that at the end of the day (Monday, October 24) he again inspected the pit and determined that the topsoil was still too wet for the pan, and thus he called Yutzy Monday evening and informed him not to come to work Tuesday morning. According to Wyant, he again inspected the pit Tuesday afternoon and determined that the topsoil would be too wet to work with on Wednesday. However, Wyant testified that during the day on Tuesday he was able to stockpile coal from another pit which readied that pit for back filling with a spare dozer. Thus, Wyant called Yutzy Tuesday night and explained to him that it would be too wet for him to pan on Wednesday, but that he could report to work and back fill the pit with a dozer. Yutzy did report for work Wednesday morning and performed the back filling job with the spare dozer. By Thursday morning (October 26) it became dry enough for Yutzy to go back using the pan, and thus Yutzy worked on his normal job Thursday and Friday. Wyant testified that Yutzy never asked him if he could make up any of the lost time by working on Saturday.

Larry Sanner, Terry Pletcher, and David Wyant all testified as to numerous occasions where various employees were prevented from working because of weather conditions, together with the lack of alternative work. In this connection, Pletcher and Wyant made reference to specific named employees, the machinery which they operated, and the weather-related reasons why the various machines could not operate under certain weather conditions.

2. Analysis and conclusions regarding the layoffs of Marker, Lee, and Yutzy

In *Wright Line*,[19] the Board established that if the General Counsel makes a prima facie showing that protected activity was a motivating factor in the employer's decision to take disciplinary action, the burden shifts to the employer to demonstrate that the action would have taken place even in the absence of the protected activity. Marker, Lee, and Yutzy were three of the four original union organizers. They attended many union organizational meetings and they were outward union supporters while at work. I find that the Company knew of their union support. The union organizational campaign at the Company, ending with the September 20 election, was hard fought by both sides. The Company was unquestionably against the Union, and certainly made no secret of this fact. The alleged discriminatory layoffs of Marker, Lee, and Yutzy commenced on the heels of the election, in the case of Marker, September 26 and November 7, in the case of Lee, September 25, and in the case of Yutzy, September 25, October 24, and November 7. Thus, I find that the General Counsel made a prima facie showing that the union activity and support of Marker, Lee, and Yutzy was a motivating factor in the Company's decisions regarding the layoffs. However, I now find that the Company demonstrated, through credible evidence and testimony, that the layoffs would have taken place even in the absence of the protected union activity. Regarding the layoffs, I now generally credit the testimony of employees Marker, Lee, and Yutzy, and Company Officials Larry Sanner, Terry Pletcher, David Wyant, and Galen Beachy. Although there were some conflicts in the testimony, I find that they were minor and unnecessary to resolve in order to come to ultimate conclusions regarding the layoffs of Marker, Lee, and Yutzy.

Contrary to the inferences of portions of testimony from Marker and Yutzy, I now find that there had previously been numerous employees who had been laid off or sent home because of weather conditions and the unavailability of alternative work. Marker testified that when it would be too wet to operate a pan, he would ''always'' be assigned other work. Marker indicated that this would occur approximately

[17] Wyant confirmed the telephone conversation with Sanner during his testimony.

[18] The record, in fact, reflects that Yutzy did not work on Saturday, November 12.

[19] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

10 times throughout a year, adding that he ''missed a day or two'' over 4-1/2 years when it was too wet to pan and there was not any other work for him to do. Marker stretched the truth here. I find that he had adopted a habit or practice of when it rained and would be too wet to pan, he would not report to his pit or jobsite but would report directly to the mechanics' shop and inquire as to whether the mechanics needed any help that day. Marker testified that he felt no one would say anything to him if he was seen working with the mechanics, and thus admitted that he did this without any knowledge or authorization of or from any supervisor.[20] Employee Yutzy testified that he had never been laid off or told not to come to work because it was too wet to operate the pan, adding that in such cases he would run a dozer, a rock truck, or anything to get his time in. The complete accuracy or credibility of this testimony by Yutzy is of no consequence in this case, as I am convinced that on the dates in question in this case, it was too wet to work and there was no alternative work. Furthermore, Yutzy was a bit lackadaisical about his work, voluntarily skipping days on occasions for personal reasons.

I now find that the Company's practice of reassigning other work when poor weather prevented an employee's performance of his usual and normal work depended on the availability of such alternate work, and if not available the employee was either sent home or called and told not to report to work. The testimony of Larry Sanner, Terry Pletcher, and Dave Wyant reflects that in the past there had been numerous layoffs of other employees because of weather conditions, and who had lost working time as a result. I note also that Marker, Lee, and Yutzy were all offered to make up lost time by working on Saturdays, and I find that this was a known policy of the Company. Employee Marker was a pan operator, Lee was a dozer operator, and Yutzy normally operated a pan and occasionally a dozer. A pan was used to convey topsoil to the pit area during the reclamation process, and thereafter the dozer was used to spread and even out the topsoil. Regarding this process, I find that the pan could operate without a dozer, but the dozer was useless until the pan conveyed a substantial amount of topsoil to the pit area. Among all of the equipment used by the Company, the pan was the most susceptible to rain and wet conditions, and the dozer was not far behind. Thus, pan and dozer operators were the employees most affected by wet conditions, including Marker, Lee, and Yutzy. It is essentially undisputed that on the dates of the layoffs, a pan could not be used, nor could the dozer be used (at least as far as topsoil was concerned). From creditable evidence and testimony on the record, I am convinced that prior to and during the layoffs involved here, the Company looked for alternative work, but found that there was none available.

From the foregoing, and from all the testimony and evidence, I now find that the Company has fulfilled its burden in demonstrating that the layoffs of Marker, Lee, and Yutzy would have taken place even in the absence of their union support and protected activity. I shall thus recommend that Paragraphs 10(a), 11, and 12(a) of the complaint be dismissed.

[20] During his cross-examination, Larry Sanner conceded that he knew Marker periodically helped the mechanics.

B. *The More Onerous Working Conditions Regarding Marker*

Paragraph 12(b) alleges that on or about October 27 the Company imposed more onerous terms and conditions of employment on employee Scott Marker by refusing to allow him to participate in its compensatory time program while permitting other employees to utilize the program, in violation of Section 8(a)(3) and (1) of the Act.

Employee Marker testified that ''in the fall of 1988, he asked foreman Galen Beachy if he could work extra time or 'time ahead' to take off in the approaching hunting season.'' According to Marker, Beachy stated that he would have to check with Larry Sanner. Beachy later told him that he had talked to Sanner and that Sanner had authorized the extra time, but that it had to be done on a Saturday only, during regular hours. Marker testified that he ''was working through dinner one day'' when Terry Pletcher stopped him and told him that he could only work time ahead on Saturdays.[21] Marker then related that in the fall of 1988 he observed employees Sylvan Warnick and Marv Warnick still working when he left at 3:30 p.m.,[22] and that Sylvan Warnick told him that he was working extra hours ''to go hunting, take a trip out west.'' According to Marker, Warnick also stated that when he worked on a Saturday he started early and then quit early. Marker testified that both Sylvan and Marv Warnick wore ''Vote No'' hats during the union campaign. Marker testified that during his previous employment (before October 1988), he was always allowed to work extra hours ahead, and he would usually either work through dinner or work late an hour or two in the evening. Marker indicated that in the fall of 1987, he left the jobsite two or three times to go hunting, and was also accompanied by employees Dwayne Blank and Danny Klink. Marker added that no one from management ever said anything to him about leaving the job to go hunting, and that ''one particular day we went hunting'' and then came back, and that after quitting time, ''we'' went down to a bar that is down the road from the shop. According to Marker, about 15 minutes later Terry Pletcher came into the bar and asked them if they had gotten anything when they went hunting. Marker related that he did not remember if ''we got any or not.'' According to Marker, Pletcher was joking about the matter, and Marker testified that ''we'' asked Pletcher what ''we'' should put down on the timecard, and according to Marker, Pletcher replied to put down ''F O,'' explaining that it meant ''fucking off.'' Marker never expanded on who the ''we'' actually were, other than himself, and he did not give any date, season, or year for this event at the bar with Pletcher. In later testimony, Marker conceded that he saw the Warnicks working the extra time during the week in early September, but Marker insisted that he saw Sylvan Warnick working extra time during the week ''after'' the election.[23]

[21] In his testimony, Marker does not connect Pletcher's remark to any particular date, season, or year.

[22] Normal working hours were 6 a.m. to 3:30 p.m., including Saturdays.

[23] On November 2, 1988, Marker gave a sworn statement to a Board investigator wherein he had indicated that he saw the Warnicks working extra during the week only ''right before the election.'' When shown this statement (affidavit) during his testimony, Marker continued to insist that he had seen Sylvan Warnick working

Continued

Galen Beechy had worked for the Company as a foreman since May 1981. Beachy testified that a meeting was held at Larry Sanner's home on Saturday, October 2, and that in addition to himself and Larry Sanner there was present Douglas Sanner (president of Sanner Energies) and Judy Pletcher (treasurer of Action Mining). According to Beachy, he had become confused with the Company's policy regarding ''make up time'' and ''build up time,'' because on Friday (the previous day) he had allowed employee Marker to go home early to get material for his house, and that later on that day ''other employees'' at the same pit reminded him that in one or two other instances he (apparently referring to Marker) had done the same thing without Beachy's blessing. Beachy indicated that because of this, he asked Larry Sanner to have a meeting on the subject and the meeting was held the following day, and according to Beachy, those present, in addition to himself, were Douglas Sanner (supervisor and president of Sanner Energies), and Judith Pletcher (treasurer of Action Mining). Although both Sanner and Pletcher testified in the case, they were not asked about the October 2 meeting. Beachy related it was decided at the meeting that the Company would allow ''build up time'' to be done only on Saturdays during regular working hours. Beachy testified that such ''build up time'' was discussed mainly regarding hunting. According to Beachy, it was also decided at that meeting that ''make up time'' (as opposed to ''build up time'') would only be done in the evenings after work or on Saturdays, but not early in the morning before the start of the shift (6 a.m.). Beachy testified that some time following this meeting, Marker approached him and asked him if he could come in early to build up time to go bear hunting. Beachy indicated that he told Marker he could only build up time during regular working hours on Saturdays, but that he would ''double check'' the matter with Larry Sanner. Beachy did check with Sanner who confirmed that he had given the right answer to Marker. Beachy testified that thereafter and on a Friday, Marker asked him if he could build up time with his pan on Saturday, and that he told Marker he could. Beachy indicated that the problem with working before the morning shift involved safety, in that there would be no other employees or supervisors present, whereas with evening work (after 3:30 p.m.) there would always be others there, and that he (Beachy) himself was always at the pits late in the evening until 7 p.m. or 8 p.m. when ''make up time'' was generally over. Beachy added that in most cases, it was dangerous to operate heavy equipment when no one else was around.

Larry Sanner testified that prior to October the Company had an informal policy whereby employees could build up time by working late, or working on Saturdays. According to Sanner, employees could also build up time early in the morning before their shift started with the permission of their supervisor. Sanner added that while employees could not work through lunch to build up time, they could do so in order to leave work half an hour early for appointments, and so forth. Sanner testified that Beachy came to him indicating that he had had some discussions with employees about building up time, and that he wanted to know how the Company was going to handle the matter. Sanner related that Beechy ''had a lot of questions all the time about men building up time.'' Sanner indicated that the result of this question by Beachy, a meeting was held at his home on Sunday, October 2, and that beside himself, present were Beachy, Judy Pletcher, and Doug Sanner. The purpose of the meeting was to discuss build up time and making up time. Sanner testified that they all decided they needed to ''get a better handle on that situation . . . so that supervisors knew exactly what was going on when the employees were building and making up time.'' Sanner testified that in order to get a better ''handle'' on make up time and build up time, they all decided that build up time would be handled on Saturdays during regular working hours on the employees' ''own piece of equipment.'' Sanner indicated that some time after that meeting Beachy again approached him and said that Marker asked him if he could work early in the morning to start building up time, and that he (Beachy) wanted to ''clarify'' the matter again. Sanner related that he reminded Beachy of what they had decided at the October 2 meeting, and again advised Beachy that build up time could be done on Saturdays during regular work hours. Sanner indicated that since October 2, this policy had been adhered to by all supervisors. Terry Pletcher testified that prior to October, the Company had a ''practice'' of allowing build up time to be done anytime, but that the Company ''had a problem with men, more or less . . . doing it anytime they wanted to.'' Pletcher added that the Company could not keep track of men who said they were working early in the morning or late in the evening, and the ''practice'' was changed to Saturdays only.

Regarding the issue of build up time, I now credit completely the testimony of Beachy, Terry Pletcher, and Larry Sanner.[24] I find that the rule (or practice) regarding build up time was in fact changed at the meeting of October 2. Although the record is somewhat sparse,[25] I find that the rule change regarding build up time was lawfully imposed and administered in a nondiscriminatory manner. There is absolutely no evidence in the record indicating that any employee, starting with October, was allowed to build up time other than on Saturdays during regular working hours. Marker testified that in the fall of 1988, and at some time after

extra hours after the election. The Warnicks did not testify in the case.

[24] The October 2 meeting was held at the home of Larry Sanner. Beachy gave no testimony as to where the meeting was held, and left out the presence of Sanner at the meeting. The fact that he forgot about the presence of Larry Sanner does not have, in my opinion, any effect on his credibility. Beachy obviously knew, at one time, the presence of Larry Sanner at the meeting during the occurrence of these ''build up'' time events, having initially gone to Sanner over the matter, and again having gone to Sanner for clarification after Marker's inquiry. Further, I now disavow fn. 21 in my initial decision. On further reflection, and after a complete rereading of the record (including exhibits), and after reviewing my trial notes (which had been misplaced), I now discredit the Company's witnesses only regarding their preelection actions and conduct, involving only violations of Sec. 8(a)(1) of the Act.

[25] Beachy testified that one reason was for safety regarding early morning (before shift) work, and Beachy himself was for some reason confused on the rules regarding both make up time and build up time. Larry Sanner testified that the rule was changed so that supervisors could better get a ''handle'' on make up time and build up time. Pletcher indicated that it was to better keep track of men who said they were working extra hours in the early morning and late evening hours (before 6:30 a.m. and after 3:30 p.m.). The employees kept their own timecards, on the honor system.

the election (September 20), he saw employee Sylvan Warnick working late to build up time. Although I do not discredit Marker, I feel that it would be improper to conclude that the event occurred after October 2, especially in light of Marker's indefiniteness as to when he saw and talked to Warnick.

Accordingly, I find that the General Counsel failed to make a prima facie case under the Board's decision in *Wright Line* regarding the matter of Marker and the build up time rule change. I thus shall recommend that paragraph 12(b) of the complaint be dismissed.

C. *The Reduction in Hours of Employee Frank Lee*

Paragraph 10(b) of the complaint alleges that on or about October 11, the Company unlawfully changed the terms and conditions of employment for employee Frank Lee by reducing his hourly wage and decreasing the number of hours he worked, in violation of Section 8(a)(3) and (1) of the Act.

Employee Frank Lee came to work for the Company in May 1987, and indicated that he had held various jobs, including loading coal, cleaning coal, working at the tipple, running a dragline, a driller's helper, an oiler, and running a dozer. Lee testified that he got the dozer job ''permanently'' in July. Lee had been laid off the week of September 26 because of weather conditions and no alternative work. Lee testified that on Sunday night (October 2) he received a phone call from Terry Pletcher who advised him that his dozer job was ''more or less completed,'' and that they were going to ''park'' the dozer. Pletcher then told Lee he would be ''crushing coal,'' and to report to the appropriate jobsite the following morning at 7 a.m. Lee indicated that he had performed this job in the past ''a time or two,'' adding that when he was operating the dozer he had received $9 per hour and was getting 45 hours a week, but when he went on the crusher, he went to $7.50 per hour and his time was 8 hours a day.[26] According to Lee, he worked on the crusher for about 2 weeks and in the middle of the third week his job was changed to that of loading trucks in the evening at the tipple, and his time started to ''fluctuate.'' Lee testified that Larry Sanner then asked him to call in on a daily basis to find out ''what was lined up and stuff,'' and he did so at about 9 o'clock each morning when he would be told ''whether to go to the crusher at a [sic] such a time or report down to the tipple at 4 o'clock in the evening and load trucks.'' Lee was asked what his average hours were after being reassigned from the dozer job, and he replied, ''I'd say between twenty-eight and thirty-five hours just offhand.'' Lee operated his own taxidermist business on the side, which the Company knew about, and Lee testified that it was ''hard to adjust'' to his new hours while maintaining his taxidermist business. Lee testified that in late October he approached Larry Sanner and told him that he would ''sooner be laid off'' because he could make more money in his taxidermist business. According to Lee, at that time Sanner did not give him ''much of an answer on that.'' Lee testified that a week or so later he again talked to Larry Sanner and asked him whether he had given any further thought to laying him off, to which Sanner replied ''that there was work here to do and we have to . . . do it.'' Lee indicated that ''about'' the second week of October he was assigned to the tipple, and that job included, among other things, the loading of trucks at night. Apparently, loading trucks at night on Fridays was inconvenient for Lee, and at one point he talked to Larry Sanner about the matter and Sanner replied that they loaded trucks 6 days a week and always on Fridays. However, Lee testified that on the Friday before his conversation with Sanner, he did not load trucks but went home. According to Lee, Larry Sanner saw him leave, but said nothing to him.

On cross-examination, Lee conceded that prior to his assignment to the dozer, he was an oiler receiving $7.50 an hour although on occasion he would run a dozer also, and was then paid the appropriate rate for operating the dozer. Lee further conceded that he knew that his dozer job was coming to a completion, and that when he was assigned to the crusher (on October 3) he replaced employee Neil Berkley, over whom he thought he had seniority.[27] Berkley was thereafter discharged from the Company, and at the time of his discharge he had been loading trucks at the tipple at night (between 4 and 8 p.m.), the job he was originally hired to do. Lee conceded that he knew about Berkley's discharge, and that he (Lee) had replaced him on the crusher. Lee also conceded that since some days at the crusher would be very busy and others would not be so busy, Larry Sanner told him to call in in the morning after he had determined what the coal production would be for that day, and thus he could be told when to report for work that day. Lee agreed that this was for his convenience. Lee testified that the normal loading nights at the tipple were Sunday through Tuesday nights, and he conceded that since he went to church on Sunday night, that he gave up those hours. Lee further conceded that Sanner often gave him daytime hours at the tipple in order to increase his hours, adding that there were days when he put in ''some long hours.'' Lee testified that the reason his hours fluctuated was because of his work on the crusher, and he denied that there came a time when his hours began to level out. However, Lee's timecards reflected that this was not completely accurate.[28]

The only testimony that Foreman Terry Pletcher gave in the case regarding Lee's reduced hours was that Lee was hired initially as an oiler and was never a permanent dozer operator. Larry Sanner testified that the reclamation work in the pit where Lee was working (pit 21) was completed on October 3. Sanner indicated that it was then decided to assign Lee to the crusher because there was no other work for him to do on any other equipment at that time, and they also had a ''good bit'' of crushing work at that time. Sanner added that Lee replaced employee Neil Berkley at the crusher since Berkley had not been working permanently or full time at the crusher, but had been working there for just ''fill-in'' time or additional hours. Sanner related that Foreman Terry Pletcher made the actual assignment of Lee to the crusher, to begin on Monday, October 3. Sanner testified that

[26] This reduction in pay is undisputed in the case.

[27] Lee, in fact, had considerable seniority, over Berkley.

[28] At the hearing, Lee identified his timecards for the week ending December 24 through the week ending April 15, 1989, a 17-week period. The timecards reflected that Lee's hours (for the weeks ending December 24 through the weeks ending April 15) were as follows: 39-1/4 hours, 29-3/4 hours, 40 hours, 40-1/2 hours, 37-3/4 hours, 45-1/2 hours, 41-1/2 hours, 40-1/4 hours, 45 hours, 37-1/4 hours, 51-1/4 hours, 41-1/2 hours, 45-1/4 hours, 26-1/2 hours, 42 hours, 45-1/4 hours, and 47 hours.

the Company had at that time nine dozer operators and that Lee had the least seniority. Sanner testified that October 12, Lee was assigned to the tipple, where he worked Monday through Thursday nights. Sanner added that although the tipple operated on Sunday night, but that Lee had asked for and received Sunday nights off to attend church. According to Sanner, the tipple rarely operated on a Friday night, but ''a lot of times'' Lee would be asked to work at the tipple ''cleaning up, and stuff like that'' to get extra hours ''to try to get a regular workweek'' for Lee because his crusher work was irregular.

Sanner testified that about 2 weeks after Lee began working nights at the tipple, in addition to his irregular hours job on the crusher, Lee came to him and inquired as to whether or not he could somehow find a way to report to work on the crusher at a definite time, because the present situation was interfering with his taxidermy work. According to Sanner, they came to the understanding that Lee would call in at about 9 o'clock in the morning and that he (Sanner) could then tell him exactly what time to report to the crusher in the afternoon, thus giving Lee the morning hours to do his taxidermy work. Sanner indicated that in order to accommodate Lee, he scheduled crushing work to be done later in the day. This allowed Lee to finish his crusher work at about 3:30 p.m. to 4 p.m., and thereafter he could report to the tipple to handle the evening loading at the tipple. Lee had originally been hired as a dragline oiler and Sanner testified that during the summer the State Department of Environmental Resources had required the Company to complete reclamation work (including seeding) on certain pits by the fall. Sanner thus indicated that Lee was temporarily assigned to a dozer in order for the Company to meet the State-imposed fall deadline. Sanner testified that Lee started to operate the dozer some time in August, and remained on the dozer until late September, but Sanner indicated that he never directly supervised Lee (or Yutzy), adding that at the time Lee was on a dozer he was supervised by Terry Pletcher. Sanner indicated that as long as employees have the capabilities of operating other equipment, they would ship them from one job to another as the work is needed.

Regarding the reduction in hours of Lee, I now essentially credit the testimony of Lee, Terry Pletcher, and Larry Sanner. Lee was hired by the Company in May 1987 as an oiler on a dragline at $7.50 an hour. In August (1988) he was assigned to a dozer, at $9 per hour, in order to timely complete reclamation work. When that work was completed, Lee was assigned to the crusher, again at $7.50 per hour. I find that Lee's assignment to the dozer was temporary, and that no other such work was available when he was assigned to the crusher. Lee's hours were initially reduced when he was assigned to the crusher, but he was soon given additional loading work at the tipple to increase his hours. Lee himself contributed to his loss of hours by insisting on not working Sunday nights, and his need for time to engage in his taxidermy business. Notwithstanding this, his hours continued to rise and to fluctuate less. Eventually, Lee's working hours roughly approached the hours that he had received earlier in his employment (45 hours per week), due mainly to the efforts of the Company, which continued to honor Lee's request not to work Sunday nights and for time needed for his taxidermy business. I thus find that the General Counsel failed to prove a prima facie case under *Wright Line*, and accordingly I shall recommend that paragraph 10(b) of the complaint be dismissed.[29]

D. *Employee Berkley's Reduction in Hours and His Discharge*

1. Testimony and evidence

Paragraph 13(a) alleges that on or about October 3, the Company unlawfully reduced the hours of employment of employee Neil Berkley, and paragraph 13(b) alleges that the Company unlawfully terminated him on October 11, in violation of Section 8(a)(3) and (1) of the Act.

Neil Berkley testified that he was hired by the Company in December 1987 as a loader at the tipple and as an oiler on a dragline, working from 45 to 50 hours per week. Berkley related that he was at first skeptical about the Union, but after talking to union organizers at the home of one Rick Mishler on July 18, he did sign a union authorization card.[30] Berkley testified that on the day in 1987 when Larry Sanner hired him, Sanner stated that, ''If this place goes union, you might as well be looking for another job because I'll shut the doors.'' Douglas Sanner was a co-owner of the Company and president of Sanner Energies. According to Berkley, about 2 weeks prior to the union election, and at the tipple, Douglas Sanner approached him and asked him how he felt about the Union, to which he replied that if he felt the Union was going to give him the best opportunity he would vote yes, but that if he felt management would give him the best deal, he would vote no. According to Berkley, Sanner replied, ''That's all we expect from you.''[31] Berkley testified that about a week before the election he attended a Company's meeting conducted by Larry Sanner, Judith Pletcher, and Douglas Sanner, where he asked for and received pencil and paper to take notes, informing the Sanners and Pletcher that he was going to a union meeting on Sunday with the notes to compare with what the Union had to say. According to Berkley, after the meeting he asked Larry Sanner to attend the union meeting ''for the debate,'' to which Sanner replied ''No,'' as they were not allowed to bring their lawyers to the meeting and that he was afraid that the Union might try to incriminate him in some way. Berkley testified that some time in September but before the election (on September 20) he had a conversation with Larry Sanner wherein he complained about his $7 per hour pay, stating that other workers at the tipple were paid $7.50 per hour, to which Sanner replied that he could not give him a raise at that time ''due to what was happening with the Union and stuff.'' Berkley testified that his ''second gripe'' to Sanner on that occasion was that a man by the name of ''Mike Neil'' was working on days that he was sitting at home, to which Sanner replied that there was no employee at the Company by the name of

[29] Had I found that a prima facie case had been presented, I would also have found that the Company demonstrated that Lee would have been assigned from the dozer to the crusher in the absence of any union support or other protected activity on the part of Lee.

[30] Employee Richard Mishler did testify in the case, but not about Berkley.

[31] This discussion is the subject of an 8(a)(1) unlawful interrogation allegation, contained in par. 9(b) of the complaint, and which I later recommend be dismissed.

Mike Neil.[32] Berkley indicated that several days later he brought the subject of a raise up again with Sanner, and that Sanner replied, ''My hands are tied . . . with this union stuff going on.'' Berkley testified that the day after the union election he went to the office and had a conversation with clerical employee ''Roxanne Baer.'' What ''Baer'' said to Berkley was the subject of an objection by counsel, which was sustained. However, a Roxanne ''Crise'' did testify in this case. She had known Berkley for some 20 years and she had worked as a clerical for the Company for the past 7 years. Crise testified that she and Berkley did have a conversation in the office the day after the election, and that Berkley complained that he had not been invited to the Company's post-election party. Crise indicated that there was a party right after the union election but that no one was actually invited, further explaining that everyone stuck around to see how the vote came out, and that after the results were announced, those who were not pleased with the outcome left, and those pleased by the outcome stayed and participated in a party.[33] Crise indicated that Berkley ''just assumed he wasn't invited,'' and Crise denied telling Berkley that he was not invited because the Company thought he was a union supporter. Crise added that she had no idea of who Berkley supported and that she had never heard anyone in the Company talking about Berkley's union sympathies.

Berkley testified that before the election he averaged 40–50 hours per week, working from ''9:00 in the morning to 8:00 at night'' as a loader operator and other ''odd jobs around the tipple,'' but that about a week after the election his hours dropped, sometime as low as 20 hours per week, and he was also working the 4 to 8 p.m. evening shift, still as a loader operator at the tipple. Berkley indicated that he talked to Larry Sanner about his reduction in hours, and that Sanner told him not to worry about it, and that there was a train coming which he could help load probably starting at 6 a.m. Berkley testified that thereafter he discovered that they were in fact loading the train without him. Berkley related that he then went to Sanner and asked why he had not been called, and Sanner replied that he had drillers who were not drilling that day, and that one had more seniority than him. Berkley related that he pointed out to Sanner that the driller will get his 40 hours regardless and that he (Berkley) would not get his, whereupon Berkley indicated that Sanner just shrugged his shoulders.[34]

Berkley testified that on October 11 he received a phone call to come out to the office around lunchtime, and that he arrived a little early to talk with employees Robertson and Vena to try and find out what was going on. Berkley indicated that he then learned (from either Robertson or Vena, or both) that Larry Sanner had been there earlier in the day checking the loaders and ''seeing that you hadn't greased.''[35] Berkley then went to the office and met with Sanner and Beechy, and according to Berkley, Sanner first asked him if he had greased the loader the previous evening, to which he replied that he had greased one but not the other because it was raining.[36] Berkley indicated that Sanner then said that this was not the first time and that he sometimes failed to grease the loaders for 3 weeks at a time. Berkley maintained that this was not true, whereupon, according to Berkley, Sanner asked him if he was calling him a liar, to which he (Berkley) replied that he was not calling him a liar but that he had his facts wrong. Berkley conceded that ''numerous times'' Sanner had told him to make sure he was ''getting the loaders at night.''[37] Berkley further conceded that he had been told to grease certain parts daily. Berkley testified that Sanner then accused him of falsifying a timecard by entering the quitting time of 8:30 p.m. when in fact he had left at 8 p.m. Berkley maintained that this was not true, and indicated once again Sanner asked if he was calling him a liar, to which he replied that he was not but that his information was wrong. According to Berkley, he explained to Sanner that if he left at 8:05 p.m. he would mark down 8 p.m., but that if he left at 8:15 p.m., he would mark down 8:30 p.m. Berkley related that Sanner then asked him who told him to mark his timecard in that manner, to which he replied that ''everybody that works up here does it,'' and Sanner then said, ''That's not the way we do things around here.''[38] Berkley testified that he knew he was going to be fired and asked Sanner that question, to which Sanner replied that he had not come to a decision yet. Berkley indicated that he then told Sanner the only reason why he was doing this was because he was ''100 percent UMWA,'' to which Sanner replied,

[32] Berkley testified that he had learned this from employees Tony Vena and Jim Robertson. Employees Tony Vena and James Robertson both testified in this case, but neither were questioned about telling Berkley about a ''Mike Neil'' prior to the election. There was in fact a Mike Neal (spelled throughout the record both ''Neal'' and ''Neil'') who worked part time for the Company at that time. Neal had been laid off at another company, and had come to Beechy, asking for part-time work. Beechy got Sanner's permission to try Neal out working in the ''ditch,'' in place of Berkley. Beechy had complained to Sanner that Berkley's work in the ditch was not good. Sanner testified that in the preelection conversation with Berkley, he had explained all of this. In this regard, and in his testimony, Beechy corroborated Sanner.

[33] After the election, there was a gathering of union supporters about a quarter of a mile away.

[34] Berkley's timecards for the weeks ending September 23, September 30, and October 7 were admitted into evidence, and reflect 52 hours, 54 hours, and 23-1/2 hours, respectively.

[35] During their testimony, neither Vena nor Robertson was asked about meeting with Berkley on October 11. Robertson was called as a rebuttal witness by the General Counsel. During his cross-examination, counsel for Company did attempt to go into the matter, and the General Counsel objected on the grounds that it was not the subject of direct examination, and I sustained the objection.

[36] While testifying, Berkley explained that when it rained it became ''pitch dark'' and the steel on the loaders ''becomes very slippery,'' and that this was ''very common knowledge.''

[37] Employee Tony Vena testified that prior to Berkley's employment with the Company, he and employees Erwin Savage and Jim Robertson had the job of greasing the loaders, but that when Berkley came to the Company, greasing the loaders became part of his (Berkley's) duties. Vena indicated that prior to Berkley's arrival, they tried to grease the loaders every day, but that there were times when it went ''four days and even longer when [they] were pressed for working'' before the loaders were greased. Vena added that he did not know whether Sanner knew this, but Sanner had never spoken to them about it, and that they were not told to grease the loaders every day, but ''just assumed that.'' Larry Sanner testified that he had told Robertson and Savage (before Berkley was hired) to grease the loaders on a daily basis.

[38] Regarding timecards, employee Vena testified that what '''we' do is if we work until ten of 4:00, we mark down 4:00, and if we work past fifteen after 4:00, we put down 4:30.'' Vena indicated that he did not know whether Sanner knew this or not.

''How would I know that?,'' and that he replied to Sanner that he had ''witnesses that will state that you knew how I voted.'' Sanner further stated that if he was going to discharge him, that he would do it that afternoon when he came to work (at 4 p.m.). Berkley testified that when he arrived that afternoon he met Sanner, Beechy, and Pletcher just outside of the office, and Sanner then discharged him.[39] Berkley admitted that he was very angry and ''lost [his] cool,'' indicating that he did not recall a lot of things that happened, but that he did remember telling Sanner that there were a lot of ''unfair labor practices'' here, and that Sanner better save his money because the Company was going to owe him a large amount of backpay. Berkley testified that 3 or 4 days before he was discharged, he was called into Sanner's office and informed of the complaints from truckdrivers not being able to load, to which Berkley replied that it was not true. Berkley indicated he told Sanner that he had a list of the trucks, and that if all the trucks had reported before 8 p.m., he had been instructed to leave.[40] Berkley then immediately changed his testimony to indicate that he was staying until 8 p.m., and if the trucks weren't there by then, he would leave. Berkley testified that he had observed truck operators load themselves ''lots of times.''

During cross-examination Berkley indicated that he had been through a prior union organizing drive, and he was concerned about his employment security if he got involved in another union organizing drive. Berkley conceded that he had asked union organizers about job security but could not recall what their reply was. Regarding the October 4 meeting with Sanner and Beechy, Berkley denied that Sanner told him it was important for him to be at the tipple until 8 p.m. so that drivers would have somebody to load them when they arrived. In fact, Berkley initially denied that Sanner mentioned anything about greasing loaders or not being at the tipple at 8 p.m. at the October 4 meeting, but in later cross-examination, Berkley did admit that Sanner mentioned complaints about truckdrivers who were not getting loaded. Berkley maintained that at the October 4 meeting, he did not talk in a loud voice. Berkley initially could not recall anything about the loading of railroad cars, and that he only recalled asking Sanner about getting his time in. Yet, in later cross-examination, he did remember that he told Sanner that he should have been working that day loading cars, and that Sanner replied that Frank Lee was working because he was not needed on the crusher and had more seniority over him. Berkley also remembered that Sanner told him that everyone on the job had more seniority than he did. Berkley further conceded that he later learned that Ed Hoover, who also was helping to load the train, had seniority over him. Berkley conceded that ''at some point'' he learned from Sanner that he had been replaced on the crusher, and he knew that employee Lee had more seniority than him. Berkley also conceded that he had told Beechy, regarding the ditch job, that he did not want to do ''nigger'' work and further conceded that at some point Sanner told him he could stay late at the tipple if it meant getting the loaders greased. Regarding the noon meeting with Beechy and Sanner on October 11, and also during his cross-examination, Berkley conceded that Sanner mentioned that he had marked time down on his timecard when he actually was not there, but Berkley maintained that at that meeting, he ''was afraid to really show any type of anger'' because he feared that he was going to lose his job, further maintaining that he used no language that was ''out of the ordinary,'' and also denied that he called Sanner a liar, then, or at any other time.[41] Berkley also conceded that at the October 11 noon meeting he asked Sanner to swear on the Bible, and that he also told Sanner that if he was going to be fired, he wanted it done at the tipple in front of other employees. Berkley also conceded that he told Sanner if he called him at home, he would not answer the phone. Sanner also admitted that at the time of his discharge the afternoon of October 11, he got ''very angry'' with Sanner, came face to face with him, and shouted at him, but Berkley denied that he told anybody he would get them on Main Street. Berkley further conceded that Pletcher came and told him not to threaten Sanner. Also in cross-examination, Berkley admitted that his ''normal job'' was loading trucks in the evening from 4 to 8 p.m.[42] But Berkley added that Sanner was very good in getting his ''time in'' (40 hours or more) until he no longer worked on the crusher, but conceded that after he was taken off the crusher, Sanner continued to get him extra hours. Berkley also testified in cross-examination that after he was discharged and as he was leaving he pointed his finger at Sanner and told him, ''You'll get yours some day in a court of law.''

Larry Sanner testified that about 2 weeks before the election and at the tipple around 11 a.m. Berkley approached him and asked for a raise to $7.50 per hour, the same as the other regular tipple employees. Sanner replied that he ''was not at liberty to discuss any pay raises or benefits with any of the employees.'' Sanner indicated that Berkley also asked for more hours and stated that he had heard there were a few times that a Mike Neal was working at the ditch near the tipple while he (Berkley) was sitting at home. Sanner then told Berkley that Foreman Galen Beechy had told him that he wanted Neal to help him at the tipple because Neal was a much better worker than he (Berkley) was. Sanner also told Berkley that Beechy had told him (Sanner) that he (Berkley) had called working in the ditch ''nigger'' work. According to Sanner, Berkley admitted this remark but maintained that he had done a good job working in the ditch. Sanner then told Berkley that Beechy had not been pleased with Berkley's cooperation in the ditch, and had asked if Neal could help him, and ''that's the way we set it up.'' Sanner testified that Berkley then asked him if he could get a raise after the election, adding that would make it much easier for him to decide how he wanted to vote in the election. Sanner again refused to talk about the raise, and told Berkley that he would have to make his own decision on how he wanted to vote in the election. Sanner indicated that work on the ditch began around mid-June and it was finished around mid-September. Sanner testified that about a week before the election, at the tipple, and in front of outside truckdrivers, Berkley looked at one of the drivers and stated, ''Why don't you tell Larry [Sanner] he ought to give me a raise,'' and that

[39] Berkley was wrong about the initial presence of Pletcher, who came on the scene later.

[40] There is no other evidence or testimony in the case regarding any ''list.''

[41] Tr. vol. III, pp. 316 and 359.

[42] Tr. vol. III, p. 369.

he reminded Berkley that they had discussed the matter a week ago and that he (Berkley) knew his position on the matter.[43] Sanner testified that on the morning of the election (September 20) he approached Berkley and employee Jake Savage and asked them if they had any questions before the election and Berkley wanted to know when he was getting more ''goddamn'' money, adding that he (Sanner) knew his girlfriend was pregnant and needed maternity clothes and ''I need money now.'' Sanner again reminded Berkley that they had discussed the matter several times before and that he could not give him any answers at this time. Sanner testified that Berkley had been hired in December 1987 to load trucks in the evening at the tipple, and that his hours were from 4 to 8 p.m., or later if there were additional trucks to load. Sanner further told Berkley that he would be given extra work, if available. Sanner indicated that from the middle of March to the end of May the Company stopped loading coal at night because sales went way down, and there was no need for a second shift at the tipple, thus Berkley was laid off. Sanner indicated that in late May Berkley was recalled and resumed loading trucks, and further was given another job operating the crusher to obtain additional hours. Sanner related that there was no regular schedule of hours to be worked on the crusher, and that some days there was a lot of coal to be crushed, and on other days there was very little or no coal to be crushed. Thus, he arranged for Berkley to call in to the office around 9 o'clock a.m. to find out what time to report to work. Sanner testified that on October 3 he replaced Berkley with Frank Lee on the crusher because Lee had been running a dozer and his work was finished and they had no other position to put Lee in, adding that Lee was a full-time employee and was an older man, and that Berkley was hired in the beginning as ''just a night shift loader at the tipple'' (working usually from 4 to 8 p.m.). Sanner added that some time in July the Company gave Berkley all of the benefits that other employees had, but that he was still considered a part-time employee on the 4 to 8 p.m. shift at the tipple. Sanner related that when Berkley came to work at 4 p.m. on October 3, he asked why he had not been called that day to work on the crusher, and he told Berkley ''that he would probably no longer be running the crusher for a while,'' indicating that Lee was placed in that position, but adding that he would still be able to load the trucks from 4 to 8 p.m. as he was hired to do originally. At that time, Sanner also told Berkley he would get extra hours loading railroad cars if Lee had crusher work to do, but added that if Lee had no crusher work, he (Lee) would be the one helping to load railroad cars.

Sanner testified that on September 20, Judy Pletcher had informed him that she had received a phone call from one Bill Richter from R & M Brokerage, who had related that two of his trucks were at the Company's tipple the previous evening at 7:45 p.m., but that there was no one present to load the trucks.[44] Sanner testified that on September 22, Judy Pletcher again told him that she had received another phone call from Barron Trucking, indicating that they had a truck in at 7:40 p.m. the night before (September 21), and there was no one at the tipple to load the truck.[45] Sanner testified that on Tuesday, September 27, he examined Berkley's timecard for the previous week and discovered that Berkley had noted his quitting time to be 8 p.m. on each day he worked except Friday, September 23 (indicating a quitting time of 4:30 p.m.). Sanner indicated that that evening (September 27) he came back to the office at about 7:15 p.m. to observe when Berkley left, which turned out to be 8:00 p.m. on the following evening, September 28, Sanner again went to the office to observe Berkley's departure time, which turned out to be 7:58 p.m., but he also observed that Berkley failed to grease the loader which, according to Sanner, Berkley was supposed to do every night before he left the tipple. Sanner related that there were approximately 20 grease fittings on the loaders, and that he had personally told Berkley to grease the loaders each night, and to stay late if he had to in order to accomplish greasing the loader. Sanner indicated that the day Berkley was hired, he had instructed employee James Robertson to show Berkley how to grease the loaders.[46] Sanner testified that again on Thursday evening (September 29) he went to observe Berkley, accompanied by Terry Pletcher, and that they observed Berkley leaving at 8:44 p.m. After Berkley left, Sanner and Pletcher then checked the grease fittings on the two loaders, and discovered that only five or six grease fittings on each loader had been greased, and Sanner indicated that those fittings could all be greased from one spot.[47] Sanner further testified that he also observed Berkley leaving on the nights of Tuesday, Wednesday, and Thursday (September 27, 28, and 29), and that on Tuesday and Wednesday Berkley left at 8 p.m., and on Thursday at 8:44 p.m. On his timecard, Berkley had indicated that his quitting time on Tuesday was 8:30 p.m., and on Thursday 9 p.m. Sanner indicated that on October 4 he examined Berkley's timecard for the last week in September, discovered the two defects, and that afternoon he had a conversation with Berkley in his office. Also present was Foreman Galen Beechy. Sanner testified that he confronted Berkley with the truckloading complaints regarding September 19 and 21, and his failure to grease the loaders. According to Sanner, Berkley got very angry, calling the truckdrivers liars, claiming that he did grease ''those damn loaders every night,'' and stating ''this is all bullshit.'' Sanner indicated that he also intended to bring up the timecard discrepancies, but that he did not do so at that time because ''the meeting

[43] Berkley, in his testimony, had indicated that the drivers themselves (and on their own) had told Sanner he should give him a raise.

[44] Subsequently, a letter about the matter was received from Richter, confirming the incident and further indicating that the drivers ''even went to your main office thinking maybe they could find a telephone number to call for assistance . . . [and] finding no one around and no number to reach anyone, they left.'' The two drivers were James Boyer and David Hendericks, both of whom testified in the case corroborating Richter's complaint. On his timecard, Berkley had noted that he quit at 8 p.m. on September 19.

[45] As he had done with Richter at R & M Brokerage, Sanner requested a letter about the incident from Barron Trucking. The letter was received (dated September 28), and confirmed the events of the evening of September 21, and indicated that the truck ''had to be held over to load in the A.M.'' Here again, on September 21, Berkley noted on his timecard that he quit at 8 p.m.

[46] The Company had two loaders, a ''560 Huff,'' and a smaller loader which was normally used to load the trucks, an ''80 Kawasaki.'' Robertson, in his testimony, confirmed that he had instructed Berkley on how to grease the loaders.

[47] During Terry Pletcher's testimony, he was never asked about the Berkley surveillance the evening of September 22.

was getting much out of hand.'' Sanner testified that again that evening (October 4) he had observed Berkley leaving at 10:15 p.m., and he thereafter checked the loaders and discovered that they again were not greased. Sanner testified that he next talked to Berkley on Thursday, October 6 at about 11 o'clock a.m. when Berkley pulled up in his pickup truck and asked why he had not been called to help load railroad cars that morning. Sanner related that Berkley was ''loud'' and ''very angry,'' and that he told Berkley that the employees loading the railroad cars were older men with more seniority, and that his help was simply not needed that morning. Berkley then said that he needed more time and Sanner replied that he would give him all the extra time that he could, but that he was not going to make work for him. Sanner testified that he then told Berkley that he was concerned about his ''responsibilities,'' mentioning that the loaders had again not been greased Tuesday evening (October 4), whereupon Berkley ''got real loud'' and ''real upset,'' again maintaining that he greased the loaders every night before he left, and that he always was there until 8 p.m. Sanner indicated that he told Berkley at that point that the best thing he can do right now is just report to the tipple at 4 p.m., whereupon Berkley ''stormed'' away.

Sanner testified that at about 7:15 a.m. on Tuesday, October 11, he and employee Robertson checked the 560 Huff loader and determined that it had not been greased the night before.[48] Sanner indicated he then went to the office and checked Berkley's timecard for the prior week (the week ending Friday, October 7). Sanner had observed Berkley leave at 10:15 p.m. on Tuesday, October 11, and on checking Berkley's timecard he found that Berkley reported 10:30 p.m. as his quitting time that evening. Sanner indicated that he then told Judy Pletcher to call Berkley and tell him to report to the office at 12:30 p.m., and that he then went back over to the tipple to check the other (Kawasaki) loader to see if it had been greased the night before. According to Sanner, present at the loader were also employees Robertson and Jake Savage, and Sanner testified that he determined that the Kawasaki loader had not been greased the night before.[49] Berkley arrived at the office around 12:30 p.m. and he, Sanner, and Galen Beechy went in to the conference room at the office. Sanner testified that he then confronted Berkley with again turning in incorrect timecards and failing to grease the loaders, whereupon Berkley called him a liar and stated that he had greased the loaders. Sanner replied that he, Robertson, and Savage had all observed the loaders earlier that day and agreed that they had not been greased the night before. According to Sanner, Berkley then indicated that he had greased the Kawasaki loader, but not the 560 Huff because it had started to rain. Sanner then and again told Berkley that he, Robertson, and Savage had all observed that both loaders had not been greased, and according to Sanner, Berkley did not further deny not greasing the Kawasaki. Sanner testified that they then discussed the timecards, and that Berkley claimed ''if he worked past fifteen minutes past the hour, or past the half hour . . . he would round his time off to the next half hour.'' Sanner then asked Berkley who told him he could do that, to which Berkley replied that he learned it from one of the other employees.[50] Sanner testified that he then accused Berkley with occasionally marking his timecards later than the time he worked, and still not grease the loaders. Sanner indicated that Berkley again accused him of lying, and that Berkley's voice kept getting louder throughout the entire conversation. Sanner testified that he then told Berkley that he had actually observed him leaving earlier than his timecard reflected, and without greasing the loaders, whereupon Berkley replied that he was trying to get even with him because of his union activities. Sanner explained that the Union had nothing to do with the reason for the discussion, and that he did not know what union activities Berkley had engaged in. Sanner testified that at one point Berkley asked for Beechy to leave the room, and that he (Sanner) said no, but that he wanted Beechy present because ''these problems we're having need to be worked out.'' Whereupon Berkley kept getting louder with Berkley remarking that if he was going to be fired, he wanted to be fired at the tipple in front of the crew, adding that he wanted an audience. Sanner related that he then told Berkley to figure on reporting back to work at 4 p.m. unless he (Sanner) decided to terminate him, in which case he would call him by 3:30 p.m. According to Sanner, Berkley then told him not to bother calling his house because he would not answer the phone if it rang. Berkley then stated that he would discuss it again at 4 p.m., and got up, stated, ''Remember my girlfriend is pregnant, and I will not quit,'' and Berkley then left, slamming the door shut as he went out. Sanner testified that he and Beechy thereafter discussed Berkley for ''probably an hour,'' considering various things, including the fact that Berkley had been lying to them, the fact that you couldn't have a discussion with him without it getting out of control, the fact that he was still considered a part-time employee and had been with the Company for less than a year, the fact that he had a terrible attitude, his poor cooperation while on the job (discussing the ditch digging incident), and the fact that Berkley had called him a liar. Sanner indicated that he and Beechy then made the decision to terminate

[48] In his rebuttal testimony, Robertson was certain that the time was not 7:15 a.m., but 11:15 a.m. Robertson also testified that he agreed with Sanner that the ''steering arms'' on the (560 Huff) loader had not been greased, but that it did appear the ''center pins'' had been greased. According to Robertson, they called up Jake Savage who appeared driving the ''Kawasaki'' loader and said he (Savage) was also greasing ''that machine too.'' Sanner apparently then checked the steering arms of the Kawasaki, and stated that they also had not been greased. Robertson's testimony here was very confusing. Savage was also called in rebuttal and testified that he had started running the Kawasaki at 6:30 a.m. the morning of October 11 and had loaded ''a couple of trucks'' when he was called to meet with Sanner and Robertson ''somewhere between 6:30 a.m. and 10:00 a.m.,'' and that Sanner then checked his loader (the Kawasaki) and stated that it appeared as if it had not been greased (presumably the night before, by Berkley). Savage then reminded Sanner that the Kawasaki had been running that morning, and that dust could have gotten the grease fittings. Savage testified that Sanner then said ''don't you think you'd at least made it look like it had been greased?,'' to which he (Savage) made no reply, and the conversation then ended.

[49] The testimony of Sanner, Robertson, and Savage here is confusing and somewhat inconsistent, to say the least.

[50] Sanner indicated that the Company never had a ''rounding off'' policy, that timecards were done on the honor system, and that as a result of Berkley's claims, he talked to all of his supervisors about the matter, and they knew of no one else who was rounding off.

Berkley when he reported for work that afternoon at 4 p.m., and Sanner also asked Beechy to be present.

When Berkley reported for work that afternoon Sanner (with Beechy), on the walkway outside of the office, told Berkley he was terminated ''as of now.'' According to Sanner, Berkley began ''yelling and screaming'' that he wanted to be fired up at the scalehouse with an audience, and Sanner refused to do this. Sanner indicated that Berkley stated they would pay for this, that he would see them in court, and ''if I have to, I'll catch you on Main Street.'' Sanner related that Terry Pletcher, having heard the ''ruckus'' outside, came out of the office, and Berkley told him ''about the same thing,'' adding that Berkley was screaming and using profanity at Pletcher, who told Berkley to watch his mouth. Sanner indicated that he then told Berkley he had been terminated and had no right to remain on the property, and suggested that he go into the office and fill out a timecard and collect the pay that was due him. Berkley did this, and apparently thereafter left the premises.

Foreman Galen Beechy testified that Berkley worked under his supervision part time in June, July, and a part of August doing ditch work for drainage and helping to put in a water sprinkling system at the tipple, and reporting to work at 11 a.m. during this period. Beechy indicated that he would give Berkley instructions on what to do, and then left to check his pit operations, and when he came back to check Berkley's work, he would find that it either wasn't done or it was done very poorly. Beechy related that Berkley ''wouldn't follow my instructions or else just didn't care.'' Beechy testified that once, on a very hot day, he was working with Berkley shoveling in the ditch, and Berkley remarked that this was ''nigger'' work and he didn't think he should have to do it. Beechy then asked Larry Sanner to assign someone else to assist him in the ditch work. Beechy indicated that later that day he was in the office and Judy Pletcher introduced him to Mike Neal, who needed part-time work. Beechy then took Neal to the ditch, instructed him in what he wanted done, and Beechy indicated that Neal did ''a very fine job'' and helped him complete the job.

Beechy was present when Sanner talked to Berkley on October 4 about not being present to load trucks. According to Beechy, there were three such incidents.[51] Beechy testified that Berkley immediately jumped up, pointed his finger at Sanner and said, ''You're full of shit, you're lying,'' and maintained that he was at the tipple until 8 p.m., and further accusing the truckdrivers of lying. Beechy indicated that Sanner then brought up the fact that Berkley had failed to grease the loaders, and Berkley again called Sanner a liar, adding that Berkley was ''very loud'' and ''out of hand'' and Sanner then asked Berkley to leave, and the conversation ended. Beechy was also present during the first conversation with Berkley on October 11 when Sanner brought up the incorrect timecards and, again, the fact that Berkley was still not greasing the loaders. Berkley again told Sanner that he was ''full of shit,'' maintaining that he did grease the loaders. Sanner replied that he, along with employees Robertson and Savage checked the loaders that morning and that they all came to the conclusion that the loaders had not been greased. Berkley then conceded that he did not grease one of the loaders because it had started to rain ''real hard'' and he had no rain coat. Sanner again told Berkley that neither loader had been greased, and Beechy indicated that at that point Berkley no longer denied that he did not grease the loaders. Sanner then brought up the timecards and Berkley then conceded that if he worked until 7:45 p.m., he would mark down 8 p.m. and that if he left at 8:15 p.m., he would mark down 8:30 p.m. Sanner then asked Berkley why he did that, and Berkley replied that he had heard from other employees that this was the way to do it. Sanner then told Berkley that he wanted the time which was actually worked marked on the cards. According to Beechy, Berkley then ''got really loud again'' and accused Sanner of picking on him because of his union activities, and that he knew he was going to be fired. Beechy testified that both he and Sanner then ''stressed'' to Berkley that union activities had nothing to do with it. Beechy related that Berkley again got very loud, indicating that he wanted to be fired in front of an audience, to which Sanner replied that he never intended to fire him during the conversation, adding that all he wanted was the facts and that he would then have to ''study'' on what further decision he was going to make. Sanner also told Berkley that he would make the decision some time that afternoon, to which Berkley replied that if you are going to call me, I am not going to answer the phone. Beechy testified that after Berkley left, he and Sanner discussed Berkley's fate for ''probably a half hour,'' and that they both came to the conclusion that Berkley had to be terminated. Beechy related that at about 4 o'clock that day, he and Sanner talked to Berkley outside of the office, where Sanner then told Berkley he was terminated, whereupon Berkley got very loud and said, ''I'll meet you in Main Street in town and I'll get you for this, and you better have a good lawyer because you're going to need it.'' Beechy testified that at this time Terry Pletcher apparently heard the loud talking and came out and asked what the problem was. Beechy indicated that Berkley immediately threatened Pletcher in the same manner in which he had threatened Sanner, and Pletcher told Berkley to watch his mouth, but Berkley was still ''loud and frantic'' and kept on threatening Sanner and Pletcher. Beechy related that Sanner then told Berkley he was no longer an employee and that he should go to the office and collect any pay that was due him, and the confronta-

[51] Larry Sanner only mentioned two occasions where trucks were not able to load. There was, in fact, a third occasion. Richard Steers testified that he was a truckdriver for Croner Cartage, but that in September 1988 he was employed as a truckdriver for one Gary Gribble. Steers indicated that one night in September he was told to pick up a load at Action Mining, and that on arriving at around 7:40 p.m. he could not find anyone to load his truck, but waited a few minutes, drove to the top of the coal pile where the loading took place, and then left and tried to reach Gribble by phone. After trying for about 30 minutes, he was not able to reach Gribble. He then went to a nearby truck stop and spent the night. At 8 a.m. the following day Steers reached Gribble by phone and explained to him what had happened the previous evening. Gary Gribble also testified in the case, corroborating Steers' testimony completely, and adding that thereafter he called KT Transit and Barron Trucking and told them what had happened at Action Mining the previous night. Gribble testified that the dispatcher at Barron Trucking was ''pretty upset'' and stated that he would be calling the Sanner's ''right away.''

tion then ended.[52] During his cross-examination, Beechy initially denied that Berkley said something about a ''warning'' on October 11, but Beechy had made notes about the Berkley matter when he got home the evening of October 11, and he was shown a page of those handwritten notes and then remembered that Berkley had said that he had not considered the previous discussions about his greasing the loaders to be a warning.[53] The page from Beechy's notes also indicates that Berkley admitted that on occasions, he failed to grease the loaders, but during his testimony, Beechy could not actually remember Berkley making that admission on October 11. During his cross-examination, Beechy maintained that his loader and dozer operators at the pits greased every day ''in almost all instances.''

2. Analysis and conclusions regarding Berkley's layoff and discharge

I now generally credit all of the witnesses who testified about the layoff and discharge, except for Berkley, himself.[54] Berkley was a poor employee with a quick and nasty temper. His conduct toward and in front of Company officials after the election was reprehensible, and his attitude was always negative. This, together with Berkley's recantations, and general testimonial demeanor and manner, leads me to conclude that the significant portions of Berkley's testimony in this case were untruthful. Even up to the end, Larry Sanner continued to find extra hours for Berkley, who complained constantly about his need for more money. I find that the Company legitimately still considered Berkley as a part-time employee. The extra hours that Sanner found for Berkley included work on the crusher. When employee Lee's dozer work became completed, I find that his replacement of Berkley on the crusher was logical, and not accomplished with the intent to discriminate against Berkley by cutting his hours because of his possible or probable union support or sympathies, which I find that the Company knew nothing about at the time. There is no evidence in the case that Berkley was an outward union supporter. Berkley was ''on the fence'' about the Union, and openly stated this to Company officials. The only evidence in the record which indicated that Berkley supported the Union (over the Company) was Berkley's own testimony that he gave a ''thumbs up'' signal to someone who was holding a ''Vote No'' sign as he went in to vote. Even assuming that this ''thumbs up'' signal indicated that Berkley was going to vote for the Union, there is absolutely no evidence in the record linking the individual holding the sign to the Company's management. Additionally, Berkley himself testified that he had previously been in another union organizing campaign, and as a result he was worried about his own job security. I also find that the daily greasing of the Company's mechanical equipment was, although unwritten, a Company policy, and known by all employees. There were occasions on which conditions, or the nature and status of a job rendered daily greasing impossible, but such was not the case with Berkley.

I further find that the poor quality of Berkley's work, his poor attitude, the failure to grease the loading machines, the false entries on his timecards,[55] his failure to be present for the loading of the three trucks, and his behavior, language, and name calling, especially in front of and to Larry Sanner in the presence of Galen Beechy, all contributed solely to the decision to terminate him. Thus I find that under the *Wright Line* test, the General Counsel failed to present a prima facie case that Berkley's hours were discriminatorily reduced, or that he was discriminatorily discharged. Accordingly, I shall recommend that paragraphs 13(a) and (b) of the complaint be dismissed.

E. *Effect of New Findings on Earlier Alleged 8(a)(1) Violations*

The above new findings effect, in my opinion, only the violation alleged in paragraph 9(b) of the complaint, which alleges that the Company, through Douglas Sanner and on or about September 12 at the tipple, interrogated employees regarding their union activities and sympathies in the upcoming representational election. As far as I am able to determine from the record, this allegation is supported only by the testimony of Berkley, whom I have discredited. This allegation deals with a conversation between Berkley and Douglas Sanner (president of Sanner Energies) at the tipple 1 to 2 weeks before the election. According to Berkley, Sanner asked him if he had any questions about the election, and ''how [he] felt about the election and the situation that was happening at the time.'' In his testimony, Sanner denied that he asked Berkley how he felt about ''the Union,'' adding that ''After extensive counseling that we was not allowed to interrogate employees, and we was all very much aware of that.'' Berkley's testimony was definite in that Sanner asked him how he felt about the ''election,'' and Sanner gave no testimony relative to asking Berkley how he felt about the ''election.'' I have discredited both Berkley and Sanner in this instance which, makes the matter moot. Even if I had credited Berkley over Sanner, in my opinion it is arguable that merely asking an employee how he felt about the ''election'' is not a violation of Section 8(a)(1) of the Act.

---

[52] During his testimony, Foreman Terry Pletcher essentially corroborated the testimony of Sanner and Beechy regarding the postdischarge actions of Berkley. Roxanne Crise testified that Berkley left in a ''rage.''

[53] Larry Sanner was not questioned about this ''warning'' subject during his testimony.

[54] In this supplemental decision, and regarding the alleged violations of Sec. 8(a)(3) of the Act, I have now credited all of the Company's officials and other witnesses. With one possible exception, and regarding the alleged violations of Sec. 8(a)(1) of the Act (all occurring on or prior to the day of the election), I still discredit generally the testimony of Company officials and its other witnesses. I find a vast difference between the Company's preelection and postelection conduct. I find that the Company's attitude and actions after the election (which was won by the Company) reflected an air of ''back to business as normal.'' There was no vindictive attitude on the part of the Company, and no evidence that it was ''out to get'' union supporters. The one possible exception involves Sec. 9(b) of the complaint involving unlawful interrogation by Douglas Sanner on September 12. The only testimony in support of that allegation came from Berkley, alone. This matter will be discussed later in this decision.

[55] There was some testimony in the case that certain employees rounded off their hours, but I am convinced that the Company had no knowledge of this and had no policy to support it. The timecards were completed by the employees themselves, on an honor system, and the Company expected (and assumed) that they were completely accurate.

Accordingly, I shall recommend that paragraph 9(b) of the complaint be dismissed.

On the foregoing findings of fact and on the entire record, I make the following

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Action Mining, Inc./Sanner Energies, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. That on or about July 25, 26, and 27, 1988, and on or about August 25, 1988, the Respondent violated Section 8(a)(1) of the Act by threatening to close its mining operations if employees chose to be represented by the Union.

4. That on or about July 27, 1988, the Respondent interrogated an employee regarding his union activities and sympathies, and about the Union's organizational campaign, in violation of Section 8(a)(1) of the Act.

5. That on or about July 27 and 28, 1988, the Respondent created the impression among its employees that their union activities were under surveillance by the Respondent, in violation of Section 8(a)(1) of the Act.

6. That on or about September 7, 1988, the Respondent, in front of a group of employees, threatened that the employees would get no pay raises because of the union organizing campaign, in violation of Section 8(a)(1) of the Act.

7. That on September 19, 1988, the Respondent threatened employees that its mining operations would lose customers and be unable to operate properly if the employees chose to be represented by the Union, in violation of Section 8(a)(1) of the Act.

8. That on September 20, 1988, the Respondent, before a group of employees, impliedly threatened that employees would lose their jobs if they chose to be represented by the Union, in violation of Section 8(a)(1) of the Act.

9. That the Respondent has not otherwise violated the Act as alleged in the consolidated amended complaint here.

THE AMENDED REMEDY

Having found that the Respondent has committed certain unfair labor practices in violation of Section 8(a)(1) of the Act, I will recommend that it be ordered to cease and desist therefrom, post an appropriate notice, and to take other appropriate action. Since the time and nature of the violations support, in great part, the Objections to Conduct Affecting the Results of the Election filed in Case 6–RC–10066, and are of such a character that they would have a substantial impact on the employees' freedom of choice and prevent a fair and free election, I shall recommend that the election held in the representation case on September 20, 1988, be set aside, and a new election held when the Regional Director deems that the circumstances permit a free choice of a bargaining representative. Since I have now found the Company did not commit any of the hallmark violations (Sec. 8(a)(3) and (1) of the Act) previously found, I now will not recommend that the Company be ordered to recognize and bargain with the Union.

[Recommended Order omitted from publication.]